Supreme Court, U.S.
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No. 99-

In the

# Supreme Court of the United States

DOLE FOOD COMPANY, INC.,
DOLE PACKAGED FOODS COMPANY,
and DOLE THAILAND, LTD.,

*Petitioners,*

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF COMMERCE
and MAUI PINEAPPLE CO., LTD.,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITION FOR WRIT OF CERTIORARI

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January 26, 2000

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## QUESTIONS PRESENTED

1. May a federal agency, in construing a statutory rule for which it is responsible, ignore a decision of a federal circuit court of appeals expressly directing a particular interpretation and prohibiting another one, and apply the latter?

2. If a federal agency does interpret a statute in a manner inconsistent with binding judicial precedent, is that interpretation due substantial (or any) deference, in accordance with this Court's teaching in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)?

## STATEMENT OF CORPORATE AFFILIATIONS

Petitioner Dole Food Company, Inc., is a publicly-traded company headquartered in Westlake Village, California. Petitioners Dole Packaged Foods Company and Dole Thailand, Ltd., are subsidiaries of Dole Food Company, Inc. Counsel are aware of no non-wholly owned subsidiaries, or other ventures in which Dole participates whose stock is publicly traded.

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Petitioners Dole Food Company, Inc., Dole Packaged Foods Company, and Dole Thailand, Ltd. (hereinafter collectively referred to as "Dole"), respectfully petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Federal Circuit, which reversed a judgment of the United States Court of International Trade.

## OPINIONS BELOW

The decision of the Federal Circuit of which review is sought is reported at 187 F.3d 1362 (Fed. Cir. 1999), and is reprinted in the Appendix hereto ("App."), at pp. 1a-14a. The denial of rehearing and rehearing *en banc*, is unreported. App., pp. 15a-16a.

The decision of the Court of International Trade, which was reversed by the court of appeals, is reported at 946 F. Supp. 11 (CIT 1996), and is reprinted at App., pp. 17a-56a.

The final antidumping determination of the Department of Commerce, whose judicial review was sought in the CIT action, was published at 60 Fed. Reg. 29553 (1995), amended by 60 Fed. Reg. 36775 (1995); relevant portions are reprinted at App., pp. 57a-100a.

## JURISDICTION

Rehearing and en banc reconsideration of the panel decision in the Federal Circuit were denied on October 28, 1999. App., pp. 1a-2a. The mandate issued on November 4, 1999. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The statutory provision at issue is 19 U.S.C. § 1677b(e)(1), which is set out in the Appendix at p. 101a.

## STATEMENT OF THE CASE

A. Introduction: Value-Based and Weight-Based Cost Allocation Methods.

Although the specific point of trade law that is the subject matter of this case is somewhat obscure, the principle for which the decision below will henceforth be cited is a vital and fundamental one. In the antidumping proceeding that gave rise to this action, the Department of Commerce was charged by law with making determinations of the value of "co-products": two inherently different, but both commercially important, products emerging from the same manufacturing process.[1] The specific question presented has to do with how the costs of raw material inputs are to be allocated as between the co-products. There are two possible approaches to the allocation of those costs: apportionment may be based on inherent characteristics, such as weight, volume, or size, or on extrinsic factors, such as value.

The antidumping investigation that was the subject of the proceedings below concerned canned pineapple fruit. The very same process that produces solid canned pineapple also produces, as a co-product, pineapple juice. Neither is a "by-product": each has commercial significance in its own right. Although the Department of Commerce did not permit Dole to make a full explanation of its actual cost accounting, it determined that the actual data could not be used, and that Dole's input costs (*i.e.*, the cost of the pineapple from which juice and canned solids both originate) should be apportioned on the basis of the relative value of juice and fruit.

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[1] A "co-product" is to be distinguished from a "by-product," which is of no or very little commercial significance. Cores and hulls are a by-product of the manufacture of pineapple juice and fruit, and is sold for incorporation into animal feed or is used in landfill.

Dole argued that an apportionment methodology based on value would be circular, but, more importantly, that it would be directly inconsistent with the Federal Circuit's ruling, binding on the Commerce Department, in *IPSCO, Inc. v. United States*, 965 F.2d 1056 (Fed. Cir. 1992). In *IPSCO*, the court held expressly that input costs of co-products **must** (not should or may) be apportioned on the basis of the weight or volume of those products, without reference to their resale values.

If-Dole's view – which is to say, if the rule in *IPSCO* – prevails in this matter, then Dole will not be assessed antidumping duties in its importation of canned pineapple fruit from Thailand. Should the decision of the court of appeals stand, then Dole is liable for antidumping duties on the order of 1.73%, amounting to approximately $2 million, or $400,000 annually, based on established trade patterns. Thus important financial consequences turn on the outcome of this case, as well as important jurisprudential ones.

B. The Administrative Determination by the Department of Commerce.

Despite Dole's protestations, and despite the clear directive from the court assigned responsibility for such matters, Commerce applied a value-based protocol for the allocation of input costs.[2] The result of this was substantially to raise Dole's constructed cost of production of canned pineapple fruit substantially above its import price, resulting in

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[2] The Final Determination of the Department of Commerce, and the subsequent judicial review, involved a great many more issues – and a substantially greater number of interested parties – than those presented to the Court in this Petition. Dole has attempted to distill from this material for instant purposes only what is relevant to its own case.

the imposition of hefty antidumping duties.[3]

Dole took an appeal to the Court of International Trade, which overturned the agency's decision. In the trial court's opinion, *IPSCO* declared basing apportionment of input costs on the basis of value illegal, because it is circular, and cannot be reconciled with the underlying statutory authority pursuant to which the Department of Commerce is directed to evaluate antidumping petitions.

On the subsequent appeal of the Government and a domestic pineapple producer, the panel below[4] reversed, claiming first that IPSCO did not apply, and then that it had found a way to distinguish rather than to overrule *IPSCO*.

The panel decision (the opinion is hereinafter referred to as "*TIPCO*") appears to be founded **not** on the conclusion that the agency's interpretation of its statutory authority was **correct**, but rather only that it was **reasonable**, and therefore was entitled to deference whether it was correct or not. But the failure of the Department of Commerce to observe the strictures of a binding judicial decision was neither correct nor reasonable, and it violates fundamental principles lying at the heart of the rule of law.

Dole respectfully submits that the principle of deference to agency action, however well-established as a

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[3] Given that input costs are constant, applying a value-based allocation methodology only serves to shift constructed cost of production from one co-product (pineapple juice) to the other (canned pineapple juice). There has, however, been no antidumping petition with respect to pineapple juice, and so the impact of this notional shift had no other consequences.

[4] This case was decided by a panel of just two Judges – Archer and Rader, JJ., only one a Judge in active service, the other a Senior Judge -- after the sad death of Judge Rich on June 9, 1999. *See* Federal Circuit Rule 47.11.

matter of administrative law, does have limits, and that one such limit is that agency decisions inconsistent with binding judicial precedent are entitled to no deference. Here, the Commerce approach to allocation of input costs across co-products cannot be reconciled with the appeals court's decision in *IPSCO*, which the agency was not free to ignore. Moreover, the Department's interpretation of the law, to the extent that it differs from that mandated by *IPSCO*, is not reasonable, but is circular and unreliable, and does not conform to the clear mandates of judicial as well as statutory authority.

C. The *IPSCO* Decision.

The facts in *IPSCO* involved an antidumping investigation of oil country tubular goods ("OCTG"). The production process yielded two co-products, of different qualities: "prime" OCTG and "limited service" (or "off-spec") pipe. They are produced from the same raw materials and through the same manufacturing process, and the two products incur identical costs per ton of pipe produced. 965 F.2d at 1058. Yet because prime pipe meets certain industry standards that the limited-service pipe cannot, the two products differ significantly in utility, and have different – and often markedly different -- market values.

The importer first contended that the off-spec goods should be evaluated as a by-product, whose resale commercial value should presumably not have been considered at all. In response, Commerce concluded that the two product grades "were properly considered co-products." *Id.*, at 1058, 1060. This meant, by definition, that prime and off-spec pipe share certain costs that are incurred simultaneously. Such costs cannot be separated out and allocated exclusively to one or the other of the resulting co-products. Accordingly, some method had to be used to allocate the shared input costs to each of them. Some ratio needed to be adopted, so that for each dollar of input costs, x cents could be assigned as the cost of the steel input resulting in prime pipe, and the remainder as the cost of the raw material for the off-spec product.

Two approaches to this problem are consistent with logic, and are identified as such in the accounting literature: an allocation ratio based on (1) the **intrinsic** physical characteristics of the co-products (*e.g.*, their weights, lengths, or volumes), and (2) **extrinsic** characteristics, such as their resale values.[5] The first approach measures the **benefits** the individual co-products receive from the joint inputs (how much of the input went into the making of each co-product?), while the second measures the ability of the individual co-products to **absorb** such joint costs (how much of the commercial value of the output is accounted for by each?).[6]

In the determination reviewed in *IPSCO*, Commerce had allocated costs equally, purely on the basis of the **weight** of each end product. 965 F.2d at 1058, 1060. That is, Commerce said that since prime and off-spec pipe account for equal portions of the steel input by weight, the cost of that steel should be allocated equally to the manufacture of each co-product. On review, the Court of International Trade called this approach "unreasonable," on the grounds that it does not account for the differences in market value between prime and limited service goods. *IPSCO, Inc. v. United States*, 714 F. Supp. 1211, 1215 (CIT 1989). The court insisted that allocation of input costs had to be based on the value of resulting end products.

The importer appealed, and the U.S. Court of Appeals for the Federal Circuit expressly **rejected** the CIT's notion of allocation between co-products based on "proportionate market value." *IPSCO*, 965 F.2d at 1058. Instead, the appellate court expressly and unambiguously held, costs must be calculated on the basis on which they are **actually incurred**:

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[5]Horngren & Foster, Cost Accounting: A Managerial Emphasis (7th ed. 1991) at 527; Keller, *et al.*, Management Accountants' Handbook, 11.7-11.12 (4th ed. 1993).

[6]Keller, *supra*, at 11.10.

in direct proportion to the weight of the materials incorporated into each of the end products. *Id.* at 1060.

Allocations based on selling prices have the effect of shifting costs from lower value to higher value products, based not on the fraction of the common costs actually incurred in the manufacturing process, but on the relative ability of the end products to absorb them later in the marketplace. The *IPSCO* court found no authority in the antidumping law for any such adjustment in the calculation of cost of production. Indeed, the court considered that the Department's job was to determine an element of price (*i.e.*, input costs), which surely cannot be done by taking price as a given.

In reversing the value-based methodology of the CIT and reinstating the weight-based allocation methodology used by Commerce, *IPSCO* made clear that the antidumping law unambiguously **requires** that the Department allocate input costs of co-products based on physical measurements, such as weight, and that it **may not** take into account such elements as market values of the resulting co-products. This was a decision of principle, and did not depend on the specific manufacturing procedures before the court. Declaring the CIT approach illegal, the *IPSCO* appellate court wrote:

> Essentially, the trial court ordered an unreasonable circular methodology. The selling price of pipe became a basis for measuring the fairness of the selling price of pipe. This circular reasoning contravened the express requirements of the statute which set forth the cost of production as an independent standard for fair value.

965 F.2d at 1061.

Costs may be used to validate prices in two ways in antidumping proceedings. First, in the calculation of the cost of production under 19 U.S.C. § 1677b(b), input costs are an

element in the determination whether a foreign market price is a valid measure of fair value. *IPSCO*, 965 F.2d at 1059. And in computing constructed values under 19 U.S.C. § 1677b(e), costs are used to establish a minimum price level at which imported goods may be sold without incurring antidumping duties. *Id.* Goods sold for less than that "foreign market value" are assessed such duties in an amount designed to bring their effective price to the importer up to the set minimum level. *NSK Ltd. v. United States*, 115 F.3d 965, 968 (Fed. Cir. 1997).

Before the court in *IPSCO* was whether Commerce's methodology was required by law, as the Department claimed. In conformity with the standard pattern of analysis laid down by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Federal Circuit first examined

> whether Congress has spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

467 U.S. 837, 842-43, citations omitted. Only if the agency acted at variance to such clear legislative intent may a court impose a different interpretation. To determine whether Congress has spoken clearly, the reviewing court applies all of the traditional tools of statutory construction. *Id.*, 467 U.S. 837, 842, n. 9.

Resting its analysis on the statutory scheme as well as the relevant language of Title 19 of the U.S. Code, the circuit court in *IPSCO* held that 19 U.S.C. § 1677b(e) includes as elements of constructed value "all components of the **actual** production costs." 965 F.2d at 1060 (emphasis added). *See* App., p. 101a. Commerce's regulations likewise require constructed value to be based upon actual costs of production, and there are no

distinctions of significance between the cost of production determined under other provisions of the antidumping statutory scheme, notably § 1677b(b), and the cost of production used to calculate constructed value under § 1677b(e). *Id.* Having found the statutory language to be clear, the court nevertheless went on to looked to its legislative history of the section, and found that it showed Congress to have had an "**unambiguous intent** to provide cost of production as an **independent yardstick** for deciding whether home and export sales prices are suitable for fair value comparison." *Id.* (emphasis added).

In short, the *IPSCO* court held that Congress established that cost of production was to be conceptually independent of price, and expressed its intent in unambiguous statutory language. The Department of Commerce, in allocating costs by weight equally to prime and limited-service OCTG, was held to have "calculated constructed value **precisely** as the statute directs," not simply to have adopted one among a number of equally acceptable methodological alternatives. It had "computed constructed value according to the **unambiguous** terms of Title 19." *Id.* at 1060, 1061 (emphasis added). The court of appeals rejected the method of allocation required by the trial court, based on the relative prices of co-products (thereby making price a factor in determining cost of production and constructed value), as an "unreasonable circular methodology." *Id.* at 1061. The "broad language" of § 1677b(e), the Court stated, "**does not at any point** expressly authorize adjustment of these production costs to account for products of a lower grade or less value." *Id.* at 1060 (emphasis added).

The *IPSCO* court noted that congressional intent is crystal clear and unmistakable: the statute, in its definition of costs in the constructed value context, the legislative history, and the overall scheme, **does** directly address the issue of cost allocation for co-products. It unambiguously provides that costs are the building blocks of value, not the other way

around, and that eventual values of co-products are not to be taken into account in allocating raw material costs.

*IPSCO* is not about deference to an admittedly rational approach taken in that instance by Commerce. Rather, in that case, the court of appeals with exclusive jurisdiction over antidumping determinations ruled that there is one way and one way only of allocating input costs as between co-products, and that is on the basis of their inherent characteristics, such as weight. No system apportioning input costs in proportion to the relative ultimate value of the co-products is consistent with the statute.

In *IPSCO*, in other words, the Court of Appeals for the Federal Circuit told the Department of Commerce in the clearest language how to approach the question of apportioning input costs of co-products. It left no room for interpretation or alternatives: it found only one method to be consistent with the statute.

Yet in the case at Bar, Commerce undertook to do just what the *IPSCO* court forbade. While the Court of International Trade overruled this brazen attempt by the agency to rise above the law, the panel of the court below inexplicably reinstated and validated it.

D. How Canned Pineapple Is Made.

Petitioner Dole Thailand operates two pineapple canneries in which it processes fresh fruit into various pineapple products. Those products include canned pineapple fruit -- the subject of Commerce's antidumping investigation now under review -- as well as aseptic crushed pineapple (packed in plastic bags), cut-up pineapple used in the production of canned mixed tropical fruit, single-strength pineapple juice packed in six-ounce cans, pineapple concentrate packed in bins (which is used, in turn, in the production of a variety of canned, bottled, and frozen juice products sold under the Dole® brand), and clarified pineapple juice. All of these commercial products are made from a

common raw material, fresh pineapple, and therefore are correctly considered co-products of a single processing operation.

The fresh pineapple fruit input is purchased from independent growers by weight. A single price is paid for the fruit, without regard to which products will ultimately be made from it (these may range from the highest value products, such as fancy-grade pineapple chunks or slices, to lower value ones like choice or standard grade pineapple pieces), or in what proportions they may result.

Once it reaches the receiving area, the fresh pineapple fruit is processed through a device called a Ginaca machine. In a series of steps, this machine shells the pineapple by cutting a cylinder out of its center, cuts off the ends, cores the center cylinder, and cuts away ("eradicates") the yellow pineapple meat from the interior of the ends and shell *(i.e.*, the pineapple meat located between the straight edge of the cylinder and the rounded outward curve of the fruit). The cored cylinders are transferred to a preparation line, to be further trimmed and sliced for the production of solid pineapple products. The cores and the eradicated pineapple meat, along with other trimmings and cuttings removed during the preparation line, are used to make pineapple juice, or canned crushed pineapple.

In this material flow, there are two "split-off points," at which inputs are diverted in one direction or another: one at the mouth of the Ginaca machine, where the pineapple destined for use as solid meat is separated from the rest, and a second at the preparation line, where the material that will be used to make canned pineapple is separated from that which will make other pineapple products. Thus, the production process resulting in the two co-products – pineapple juice and

canned pineapple fruit – is analytically identical to the production process for OCTG in *IPSCO*.[7]

This is just as Judge Jane Restani held in the Court of International Trade. There is simply no reason, therefore, why the principles of input cost allocation taught by the Federal Circuit in *IPSCO* should not apply to the process of manufacturing canned pineapple fruit.

## REASONS FOR GRANTING THE WRIT

### The Commerce Department's Interpretation of the Antidumping Law Is Entitled to No Deference, Since It Is Inconsistent with the Unambiguous Ruling of a Court of Competent Jurisdiction.

A. The Federal Circuit's Decision Is Inconsistent with *IPSCO*.

The panel quite correctly noted that agencies' interpretations of the statutes and regulations they administer are generally accorded deference by the courts, and that there is no cause of action if an interpretation is wrong, so long as it is reasonable. That is the teaching of this Court in *Chevron*. It has been dutifully and correctly applied in the Federal Circuit in such cases as *Daewoo Elec. Co. v.; International Union*, 6 F.3d 1511 (Fed Cir. 1993).

The appropriateness of deference to administrative agencies is even greater when the subject matter assigned when the regulations in question are highly specialized or complicated, or the procedures that are part of the agency's decision-making process are elaborate and technical. *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996). In general, antidumping law and the determinations required

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[7] In the OCTG manufacturing process, there is a "split-off point" after the steel is made into pipe. Some material is then graded as prime goods, and the rest shunted to a different destination as off-spec goods. 965 F.2d at 1058.

for its application have the requisite complexity for the Commerce Department to be considered its "master," *Daewoo*, 6 F.3d at 1516, and the courts are and should be loathe to second-guess the Department, with all of the material and technical resources available to it, when it does what it does best.

While *Chevron* stands for the proposition that agencies are entitled to deference in interpreting "their" statutes and regulations, *Chevron* does **not** mean that an agency's discretion in the course of such an interpretation is or should be **unfettered**. Nor are agencies entitled to any deference when what they are not applying the law as written, but are interpreting judicial precedent.

In the case at bar, the Department of Commerce simply failed to apply the clear holding in *IPSCO*, applying instead a methodology of its choice: the very one that the Federal Circuit, in *IPSCO*, unambiguously instructed the Department not to use. In *IPSCO*, the court of appeals determined that there was **one** correct method for allocating input costs of co-products and **one only**: those costs must be apportioned on the basis of the inherent characteristics of the co-products, such as (here) their weight, not extrinsic factors such as their ultimate value.

The Court of International Trade agreed that the rejection of a weight-based assignment of costs in favor of an allocation based on the selling prices of end products was contrary to the antidumping law, as interpreted in *IPSCO*. *Thai Pineapple Public Co. v. United States*, 946 F. Supp. 11 (CIT 1996) , App., pp. 17a-56a. The court not only held that there was a direct and irreconcilable internal inconsistency between the methodology urged by Commerce and the requirements of *IPSCO*, but also reaffirmed the conclusion that value-based allocation of costs of production of co-products is inherently circular and unreasonable, and therefore cannot be reconciled with the strictures of the antidumping laws.

The Court of International Trade has put the proper

conclusion in appropriately stark, clear language: "In *IPSCO*, the Federal Circuit found that a value-based allocation of costs to co-products violates the antidumping statute. *IPSCO*, 965 F.2d at 1061." *Asociación Colombiana de Exportadores de Flores v. United States*, 6 F. Supp.2d 865, 881 (CIT 1998). *IPSCO* governs the question of how to allocate input costs of co-products, and it says that there is only one way for such allocation to be done properly: by allocating costs on the basis of inherent characteristics of the raw material. To perform the allocation on the basis of value is circular and illegal.

*IPSCO* was the law at the time of the valuation in this case, and yet the Department of Commerce simply declined to follow it. The Court of International chastised the Department for this unlawful and unregulated exercise of its authority. And yet it was this interpretation of the law that the appellate panel considered to be "reasonable" and therefore entitled to deference.

An agency's irrational decision, or its decision contrary to law, is not entitled to judicial deference. Yet upon review, the court of appeals determined that "[t]he methodologies relied upon by Commerce in making its determinations are presumptively correct," App., p. 11a. The court erred, however: when a Government agency chooses to disregard a binding and clearly applicable judicial direction, its actions are entitled to no deference and no presumption of correctness. Without such a rule, judicial review of agency action would be meaningless.

B. The Circuit Court's Attempts to Distinguish IPSCO Are Transparently Inadequate:

As has been shown, the Federal Circuit did not apply *IPSCO* to a case on all fours with it. Yet it proffered no persuasive reason for its unwillingness to hold the Department to a rule that the court itself had laid down.

What the court below did, to justify the agency's failure to abide by its earlier ruling, is to point out that steel and

pineapple are essentially different items. To say the least, this comes as a surprise to no one: what is surprising is that the circuit's failure to grasp the congruence between the two cases was based on such an elementary if irrelevant premise.

Every element of the court's description of the case before it applied equally to *IPSCO*; every element of the court's summary of *IPSCO* applied to the case at Bar. The following is the only explanation of the distinction that appears to lie at the heart of the court's analysis, and its reason for failing to apply *IPSCO*:

> pineapple fruit is not a homogeneous raw material like the raw material used to make the pipe in [*IPSCO*], and the production process is entirely different for the various pineapple products produced. The whole pineapple must be reduced to its various components – cored cylinders, cores, shells, and ends – prior to entering the production processes for canned pineapple fruit and juice.

App., p. 13a. It is surely true that a pineapple has "components,"[8] and that the components are used for different things in the manufacture of end products, while steel presumably flows in a continuous stream and cannot be said to have "components." But no reason is suggested as to why this is important. Surely the court never hinted, in articulating the

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[8] It is interesting to note, however, that of the pineapple "components" listed by the court, only one – cored cylinders – constitutes the (undifferentiated) raw material for all of the commercially valuable pineapple products. The others – cores, shells, and ends – are waste, whose commercial value is negligible at best. The co-products, juice and canned fruit, come from pineapple meat, not from waste material

*IPSCO* rules, that whether an input is homogeneous or heterogeneous determines whether the use of extrinsic factors to apportion its cost to co-products is even relevant, much less dispositive. Given that value-based allocation methods were rejected in *IPSCO* because they are unacceptably artificial, and their foundation is circular, and given that these propositions are true irrespective of the physical characteristics of the raw material, then the logic of the court's position is more than elusive.

*IPSCO* cannot be meaningfully distinguished. Judge Restani was right in the Court of International Trade in her treatment of that precedent, and Judge Pogue was right in *Asociación Colombiana*: *IPSCO* says clearly that "a value-based allocation of costs to co-products violate[s] the antidumping statute." 6 F. Supp.2d at 881. And that principle mandates that the position of the Commerce Department in this case was not only wrong but unreasonable and illegal. It was entitled to no deference under *Chevron*.

C. Agencies Must Follow Judicial Precedent.

At its core, this case concerns whether the Department of Commerce is obligated to follow *IPSCO*, a decision of the United States Court of Appeals charged with overseeing its operations. The answer is clear: it surely must. The fundamental principle of *stare decisis* is not overridden simply because an agency enjoys discretion to interpret its governing statute and regulations. As this Court famously stated in *Marbury v. Madison*, "it is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). The law "requires . . . that the executive branch recognize the authority of appellate courts to interpret the law and that it refrain from acting in an arbitrary and lawless manner." *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir.), *vacated and remanded on other grounds*, 469 U.S. 1082 (1984).

In an illustrative discussion of the recognized need for agencies' conduct to conform to judicial precedent, *Yellow Taxi*

*Co. of Minneapolis v. NLRB*, 712 F.2d 366, 372 (D.C. Cir. 1983), the District of Columbia Circuit refused to enforce an order of the National Labor Relations Board. In concluding that a taxi driver was an "employee" for the purposes of the National Labor Relations Act, the NLRB had sought to avoid a previous opinion of the same court concluding that taxi drivers were not employees subject to the Act. *Yellow Taxi Co. of Minneapolis v. NLRB,* The agency argued that a subsequent opinion , which did find drivers to be employees, was on point and was to be followed. *Id.* at 374.

The court of appeals rejected the Board's interpretation of the caselaw and its effects on the underlying statute. Noting that some NLRB officials at times arrogate to themselves "the authority to 'disagree' with judicial precedent," the court went on: An agency "is not a court nor is it equal to this court in matters of statutory interpretation. Thus, a disagreement by an [agency] with a decision of this court is simply an academic exercise that possesses no authoritative effect." *Id.* at 382, quoting *Allegheny Gen. Hosp. v. NLRB,* 608 F.2d 965, 970 (3d Cir. 1979). Or, as the *Allegheny* court held, "our judgments . . . are binding on all inferior courts and litigants in [this] Circuit, and also on administrative agencies when they deal with matters related thereto." *Id.*, 608 F.2d at 970.

More importantly for the case at bar, the court of appeals in *Yellow Taxi* afforded the NLRB's analysis of the caselaw no deference, although the Board was interpreting the statute whose construction and application are its daily business. Rather, the court dismissed the NLRB's claim to have met the "heavy burden" of proving as a matter of fact that taxi drivers are to be treated as employees under the Act, by effectively distinguishing the facts of the particular case under review from those in the case that constituted binding precedent.

*Yellow Taxi* and the case at bar are analytically identical. In both cases, the agency was faced with an appellate decision that, by finding a statutory interpretation to be the only

permissible one, limited its discretion to interpret its mandate. In both cases, the agency – knowing that it could not simply ignore the Court's binding decision – sought instead to evade its application by "distinguishing" the facts. Indeed, the NLRB in *Yellow Taxi* was in a more favorable position than the Department of Commerce in this case, since the NLRB could cite at least one opinion in support of its position, and therefore could plausibly contend that its interpretation of the law was sanctioned by the courts.

The Department of Commerce here, by contrast, can cite no case authorizing its use of a value-based allocation methodology, because no such case exists. The only appellate case applicable was *IPSCO*, the very case the Department failed to follow. In his concurrence in *Yellow Taxi*, Judge Bork noted that the NLRB was "trying to achieve a desired result by a somewhat disingenuous treatment of the facts." *Id.* at 385. While the circuit court saw through the NLRB's manipulations, the Court of Appeals in the case appears to have succumbed to the Department of Commerce's same efforts: an erroneous and dangerous result that only the intervention of this Court can right.

An administrative agency is "not free to refuse to follow circuit precedent in cases originating within the circuit, unless [that agency] has a good faith intention of seeking review of the particular proceeding by the Supreme Court." *National Labor Relations Bd. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987), *aff'd*, 917 F.2d 62 (D.C. Cir. 1990).

Officials of the Department of Commerce may well believe that *IPSCO* was wrongly decided. However, there are procedures to follow in such circumstances. *Spraic v. United States R.R. Retirement Bd.*, 735 F.2d 1208, 1211 (9th Cir. 1984), *cert. denied*, 501 U.S. 1217 (1991) ("[a]n agency is bound to follow precedent established by an unappealed decision of a circuit court on any matter within that court's jurisdiction."). As Judge Posner has noted, what an agency may not do, under

our system of law, is simply "refuse[] to acknowledge the pertinence of [the Court's] decision to this case." *Id. Nielsen Lithographing Co. v. NLRB*, 854 F.2d 1063, 1067 (7th Cir. 1988).

In the administrative proceeding leading to *IPSCO*, the Department had rejected a value-based allocation methodology: the very approach it applied in the case at Bar. It did so for reasons similar to those articulated by Judge Restani when this case was before her. The inconsistency of the Department's position is another reason that underscores the importance of judicially-imposed uniformity, and the essential irrationality of permitting administrative agencies to change their statutory interpretations at will, without regard to the expressed orders of competent courts. *Lopez v. Heckler*, 725 F.2d at 1497; *Nielsen Lithographing Co.*, 854 F.2d at 1067.

Likewise, if the Court of Appeals determined that *IPSCO* was wrong, then it should have sought to overrule the case.[9] But the Court did not. Instead, it abdicated its role in upholding principles of *stare decisis* by unduly deferring to an agency in matters in which the supremacy of the judicial branch should be unquestioned.[10]

D. Agencies Are Accorded Minimal, if Any, Deference When Applying Law to Fact.

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[9] Under Federal Circuit Rule 35(a), it could have overruled a binding precedent only sitting en banc.

[10] The Department of Commerce may argue that nonacquiescence is a prerogative derived from this Court's decision in *U.S. v. Mendoza*, 464 U.S. 154 (1983). However, *Mendoza* applies only to inter-circuit, not intra-circuit, inconsistencies. Agencies are not free to disregard precedent *within* the Circuit in which they are litigating. Given that only the Federal Circuit has jurisdiction over antidumping matters, it is not open to the Department to apply a policy of nonacquiescence in such cases.

As noted above, the Department has argued, and the Federal Circuit purported to conclude, that *IPSCO* does not control in this case. The Department managed to persuade the panel to focus on factual differences between pineapples and steel, rather than on the legal principles for which *IPSCO*, by its own express terms, stands. *TIPCO*, at 13-16, App., pp. 11a-14a. But the Department's position is simply not due the deference that the panel was willing to accord to it.

*Chevron* stands for the proposition that courts must defer to agencies' interpretations of their own regulations. It does not say that deference is owed to an agency's application of its legal interpretation to the facts – and certainly not the application of law to fact when that law is **caselaw**, rather than the statutory or regulatory law contemplated by *Chevron*.

This Court has commented on the distinctions that must be made between an agency's power to administer the law and its power to adjudicate it, and the amount of deference owed to the agency's fulfillment of each of those responsibilities. *Martin v. OSHRC*, 499 U.S. 144 (1990). The Ninth Circuit relied upon this analysis to elucidate the principle that fact-finding, as well as the application of law to fact, is a judicial rather than a legislative function. *RLC Indus. Co. v. Commissioner*, 58 F.3d 413, 415-16 (9th Cir. 1995). *RLC Industries* concerned the validity of a depletion allowance declared as a deduction from corporate income taxes. The Commissioner of Internal Revenue reduced the depletion deduction because, in her opinion, the taxpayer did not meet the requirements laid down in Treasury regulations. *Id.* at 414. On appeal to the Tax Court, the Commissioner argued that she had a "good and substantial reason" under the regulations for her decision. *Id.* The Tax Court rejected the Commissioner's argument and overturned her determination.

The Commissioner appealed, defending her position on the merits but arguing that, even if it was wrong, it was entitled to "substantial deference" from the Tax Court. *Id.* at 415. The court of appeals, however, rejected that argument. The Ninth

Circuit concluded that "the process of hearing the evidence in a particular case, finding the relevant facts, and applying the regulations to those facts, is a judicial, not a legislative function." *Id.* at 415-16.

*RLC Industries* is of relevance to the instant appeal for a number of reasons. This Court has, just this past year, recognized the analogy between trade and tax matters. *United States v. Haggar Apparel Co.*, 143 L. Ed. 2d 480, ___ U.S. ___, 199 S. Ct. 1392, 1400 (1999). And the Federal Circuit has itself accepted the validity of the analogy. *Mead Corp. v. United States*, No. 98-1569, 1999 U.S. App. LEXIS 17831, at *9 (Fed. Cir. Jul. 28, 1999) (*per* Rader, J.).

The position taken by the Department of Commerce here is virtually identical to the one presented by the Commissioner and rejected by the court of appeals in *RLC Industries*. The Department here purported to make a fact-based distinction between the production processes of pineapples and steel, thereby avoiding the inevitable application of *IPSCO*. The Court of International Trade, however, correctly rejected the distinction as irrelevant as a matter of law and held that *IPSCO* applies:

> The Thai plaintiffs counter that Commerce's attempt to distinguish [*IPSCO*] fails, because although in [*IPSCO*] materials, labor, and overhead costs were shared, whereas in this case there are clear differences in labor and overhead costs, this fact is immaterial because the issue of cost allocation in this case pertains only to **share raw material costs**. They are correct .... As indicated, the court finds that Commerce overstates distinctions with [*IPSCO*] and to some extent it also misstates the facts of this case.

946 F. Supp. 11, 23 (emphasis in original).

As in *RLC Industries*, the trial court took great pains to evaluate the factual basis against which the agency applied the law and concluded that the agency's application of the law to the facts was simply wrong. In upholding the Department's position based on *Chevron* deference, the court below has confused "an agency's power to interpret its own regulations with the power to apply those regulations to the facts of a particular case." 58 F.3d 413 at 415. The Court below has agreed that an agency's action merely applying the law to a specific set of facts merits **no deference**. *See Mead* at *9. The panel, therefore, was under no obligation to defer to the Department's view. In fact, to do so constitutes a serious and dangerous error.

In this case, the Department's authority to apply law to fact is particularly suspect, because what it purported to interpret is neither statute nor regulation but **judicial decisions**. As noted above, this case turns entirely on whether *IPSCO* controls, and as *Yellow Taxi* illustrates, an agency is not entitled to deference **of any kind** in such interpretation. *Chevron* and its progeny are inapposite here.

Moreover, the Court of International Trade – like the Tax Court in *RLC Industries* – has special expertise in the area of the law the Department is charged with administering. This Court has noted that

> [t]he expertise of the Court of International Trade, somewhat like the expertise of the Tax Court, guides it in making complex determinations in a specialized area of the law; it is well positioned to evaluate customs regulations and their operation.

*Haggar*, 199 S.Ct. at 1400. That court is therefore in a legitimate and unique position to question the logic and fairness of the Department's choice of cost allocation methodologies, moreso than the court of appeals, which has no business revisiting a presumptively correct view of the facts.

Because the Department of Commerce is entitled to no deference in the application of law to fact, and because the Court of International Trade is uniquely qualified to apply antidumping law to fact, the decision of the court of appeals to reverse the lower court was in error, and should be set right by this Court.

E. The Federal Circuit's Decision in *IPSCO* Was Correct as a Matter of Law and Logic, and That Precedent Should Be Reinforced, Not Undermined.

1. The court's reading of *Chevron* expressed in the *IPSCO* decision was correct.

In *IPSCO*, the court of appeals recognized the deferential standard handed down by this Court in *Chevron*, noting that Commerce's methodology was a "consistent and reasonable interpretation" of the underlying statute. *IPSCO*, 965 F.2d at 1061. However, at the time of the *IPSCO* decision, no other authority – and specifically, no judicial decision – had squarely evaluated the validity of Commerce's selection of methodology. In *IPSCO*, the appropriate appellate court read the underlying statute, considered its language and its purpose, and concluded that there was but a single permissible approach to this question. As already indicated, at issue here is not Commerce's interpretation of the statute, but its analysis of precedent, an analysis executed not through the rigors of the notice-and-comment process but on a case-by-case basis.

2. Value-based allocation methodologies result in circularity.

The Federal Circuit specifically and correctly noted in *IPSCO* that there is an inherent circularity in an allocation method that is designed to test the validity of prices by using price data to accomplish that objective. A value-based methodology will always be circular if it uses actual selling prices of the resulting co-products, and will be arbitrary if it bases its computations on hypothetical or constructed prices.

The panel deciding this case below, however, appears

to have considered that decision to have been erroneous. It found appeal in the textbook example of a hog, the common "input" for a number of products, including those of high per-unit value, such as bacon, and others far less valuable, like lard. The court suggested that this model poses a problem for Dole's proposed approach: which is to say, the approach the very same court did not merely tolerate but mandated in *IPSCO*. App., pp. 12a-14a.

Properly analyzed, the hog example is not problematic. There is nothing absurd in concluding that the, considering only input costs, a meat processor might make "[f]abulous profits" on bacon, while incurring losses on lard. App., p. 12a, quoting from the Final Determination, App., pp. 87a-89a. The example, indeed, is so misleading as to be sophistry. In the real world, input costs are not the sole, or even always a major, determinant of eventual resale price. The labor, expertise, time, and expense that are required for the manufacture, transportation, and selling of bacon all act to deplete what might otherwise be the resulting profits in a measure far greater than that attributable to lard.

All that Commerce is called upon to do by the statute is determine a means of apportioning **input** costs between co-products, not to calculate the profitability of making them, which involves innumerable other factors. Allocating costs of inputs for co-products is **inherently** an arbitrary process. An analogy revealing apparent anomalies resulting from **any** methodology in this exercise can easily be developed. The question is not whether the weight-based methodology is flawed in some artificial sense, but whether it is most reflective of **actual costs**, the statutory standard. *IPSCO* has taught that, as a matter of law, inherent characteristics-based methodologies do come closest to reflecting actual costs.

Moreover, to the extent that the hog analogy is relevant, the panel ignored the trial court's cogent and informed discussion and dismissal of it. The trial court accurately noted the critical distinction between co-products

and by-products. 946 F. Supp. at 22, App., pp. 36a-39a. It is true, as the panel noted, that a pineapple's "cylinder, core, shells, and ends have significantly different uses and values." App., p. 13a. But shells and pressed cores are by-products, not co-products (like juice), and their **value** is therefore equally **irrelevant** to cost allocation **among co-products**. During its investigation, Commerce determines whether a product is a co-product rather than a by-product. Here, everyone agrees that it did so correctly. Once that decision – the decision to include less valuable products as co-products rather than eliminate them from the calculus by classifying them as by-products – has been made, Commerce must live with the consequences that flow from it.

3. Shared costs cannot be allocated based on selling prices, when costs are used to validate prices.

Rather than supporting the distinction asserted by Commerce and accepted as reasonable by the panel, on the basis of the extent of the shared production process, the accounting authorities in fact make a different distinction, based on the purpose for which the costs are being calculated. This distinction is entirely consistent with Dole's argument here.

Thus, as noted by the Court of International Trade, cost-accounting authorities uniformly **disapprove** the use of a price-based allocation methodology if the objective is, as here, to validate prices. *Thai Pineapple*, at 22; App., pp. 36a-39a. These authorities, including both of the ones relied on by Commerce in its Final Determination, recognize that such an approach is inherently circular. Keller, cited by Commerce at App., p. 88a, states:

> **All sales-price methods are subject to one compelling criticism.** Where cost is determined by price, price cannot be determined by cost. Therefore, **all sales-price methods**

> **are circular for pricing decisions** and inferentially so for many other types of decisions that have sales price as a fundamental factor.

Keller, at 11:18 (emphasis added). Horngren and Foster, cited by Commerce in its *Final Determination*, 60 Fed. Reg. at 29560, App., p. 78a-80a, make the same point:

> Physical measures are sometimes preferred to sales value methods in rate regulation settings **when the objective is to set a fair price**. Why? Because it is **circular reasoning** to use selling prices as a basis for setting a selling price, as would be the case under the sales value at split-off method.

Horngren & Foster, Cost Accounting: A Managerial Emphasis (7th ed. 1991), at 532 (emphasis added).

This problem of circularity was surely recognized by the court in *IPSCO*:

> The selling price of pipe became a basis for measuring the fairness of the selling price of pipe. This circular reasoning contravened the **express requirements** of the statute which set forth the cost of production as an **independent standard** for fair value.

*IPSCO*, 965 F.2d at 1061 (emphasis added). The court of appeals in *IPSCO* specifically ruled that "Commerce's weight-based (non-value) methodology was **correct**, not just permissible." *Thai Pineapple*, 946 F. Supp. at 24; App., p. 41a (emphasis in original). The *IPSCO* court rejected market value-based cost allocation methodologies as circular, and therefore nonsensical, and therefore unlawful.

Thus the very same accounting authorities on which Commerce relied correctly and uniformly conclude that "'all sales-price methods are circular for pricing decisions'." *Thai Pineapple*, 946 F. Supp. at 22, App., p. 37a. The appellate panel puts forward no answer to this criticism. In any methodology in which costs are allocated based on price, neither the cost of production nor the constructed value can be independent of price. It makes no sense for input costs to be determined by eventual resale prices: it is the former that influence the latter. Hence the inescapable circularity.

Nor is the circularity problem solved by confining reference prices to those of earlier years or other markets. There is no basis on which to assume that prices in years prior to the initiation of the antidumping petition, or in different and distant markets, are independently reflective of actual costs, as the statute requires. Under the antidumping law, Commerce is directed to use **real** cost of production under § 1677b(b) to validate foreign market prices as above cost, and constructed value under § 1677b(e) to deem prices not subject to dumping duty offsets. It is not free to select arbitrary and unreliable values. All types of cost allocations based on later selling prices are therefore either circular or entirely arbitrary or both, and none may be used to calculate costs in an antidumping proceeding.

## CONCLUSION

For all of the foregoing reasons, Petitioners Dole Food Company, Inc., Dole Packaged Foods Company, and Dole Thailand, Ltd., respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Federal Circuit, and that the decision of that court be reversed.

Respectfully submitted,

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Dated: January 26, 2000

# APPENDIX

Opinion of the United States Court of Appeals
for the Federal Circuit
(Pp. 1a-14a)

Denial of Rehearing in the United States Court of Appeals
for the Federal Circuit
(Pp. 15a-16a)

Opinion of the United States Court of International Trade
(Pp. 17a-56a)

Final Determination of Sales at Less Than Fair Value:
Canned Pineapple Fruit from Thailand
Agency: Import Administration,
International Trade Administration,
Department of Commerce
[Excerpts]
(Pp. 57a-100a)

19 USC §1677b(e)(1)
(P. 101a)

# United States Court of Appeals for the Federal Circuit

97-1424,-1437

THE THAI PINEAPPLE PUBLIC CO., LTD., SIAM FOOD PRODUCTS PUBLIC CO., LTD., MALEE SAMPRAN FACTORY PUBLIC CO., LTD., and SIAM AGRO INDUSTRY PINEAPPLE AND OTHERS PUBLIC CO., LTD.,

Plaintiffs-Appellees,

and

DOLE FOOD COMPANY, INC., DOLE PACKAGED FOODS COMPANY, and DOLE THAILAND, LTD.,

Plaintiffs-Appellees,

v.

UNITED STATES,

and DEPARTMENT OF COMMERCE,

Defendants-Appellants,

and

MAUI PINEAPPLE CO., LTD.,

Defendant-Appellant.

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DECIDED: July 28,1999

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Before RICH,* Circuit Judge, ARCHER, Senior Circuit Judge, and RADER, Circuit Judge.

ARCHER, Senior Circuit Judge.

DECISION

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* Circuit Judge Rich died on June 9, 1999. This case was decided by the remaining judges in accordance with Fed. Cir. Rule 47.11.

The United States, the Department of Commerce (Commerce) and Maui Pineapple Co., Ltd. (Maui) (collectively Appellants) appeal from the judgment of the Court of International Trade, holding that Commerce's determinations relating to the allocation of the cost of purchased raw material - fresh pineapple fruit - between canned pineapple fruit and other products were unsupported by substantial evidence, arbitrary, capricious, and contrary to law. The court remanded the case for recalculation of the anti-dumping duty margins (dumping margins) using either the Thai producers' weight-based allocation methodologies or a non-output price-based cost allocation methodology. *See Thai Pineapple Public Co., Ltd. v. United States*, 946 F. Supp. 11 (CIT 1996) (*Thai Pineapple I*). On remand, Commerce calculated fruit costs for the Thai producers using their submitted weight-based fruit cost allocation methodologies. The Court of International Trade sustained the remand results and entered final judgment on March 18, 1997.' *See Thai Pineapple Public Co., Ltd. v. United States*, 1997 WL 129156 (CIT March 18, 1997) (*Thai Pineapple II*). Appellants challenge the Court of International Trade's conclusion that Commerce wrongly allocated raw material costs in rendering its *Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit From Thailand*, 60 Fed. Reg. 29553 (June 5, 1995), as amended, 60 Fed. Reg. 36775 (July 18, 1995) (*Final Determination*). We reverse.

## BACKGROUND

In response to a petition filed on behalf of the U.S. industry, Commerce initiated an investigation of canned pineapple fruit from Thailand. The investigation concerned Thai producers of canned pineapple fruit, including Dole Food Company, Inc. (Dole),[1] The Thai Pineapple Public Co., Ltd. (TIPCO), Siam Agro Industry Pineapple and Others Public Co., Ltd., (SAICO), and Malee Sampran Factory Public Co.,

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[1] Dole Packaged Foods Company is a division of the Dole Food Company, Inc., and Dole Thailand, Ltd. is a majority-owned subsidiary.

Ltd. (Malee) (collectively Thai producers).[2] The Thai producers produced canned pineapple fruit as well as products outside the scope of the investigation such as pineapple juice and juice concentrate. These products use separate parts of the same fresh pineapple fruit and thus they share raw material costs. In its determination, Commerce had to calculate the Thai producers' cost of production for the purpose of determining dumping margins and, in so doing, had to allocate a portion of the shared pineapple fruit costs to canned pineapple fruit.

Commerce issued cost questionnaires to each of the Thai producers requesting both cost of production (COP) and constructed value (CV) information. . In their financial accounting records used to inform management, shareholders, and governmental authorities about the companies' financial condition TIPCO, SAICO and Malee (TIPCO et al.) allocated raw material costs between canned pineapple fruit and pineapple juice. These financial accounting records were audited and were kept in accordance with generally accepted accounting principles (GAAP) in Thailand. Dole allocated the entire cost of the purchased raw material to canned pineapple fruit. Although these allocation methodologies had been used for many years, when Commerce requested information the Thai producers argued that these methodologies were unreliable. According to the Thai producers, an alternative methodology was necessary because their financial accounting cost allocations were based on certain managerial and tax goals, and thus, were not reflective of actual production costs. The Thai producers' alternative methodology was based upon the weight of fresh pineapple fruit used to produce the various pineapple products. The weight-based allocation resulted in a raw material cost for canned pineapple fruit that was less than the cost shown in their financial accounting records.

Commerce rejected the weight-based raw material fruit cost allocation for both COP and CV. In the final determination for TIPCO et al., Commerce relied upon the

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[2] Siam Food Products Public Co., Ltd., although an interested party, was not a respondent in the administrative proceeding.

methodologies reflected in their financial accounting records. For Dole, Commerce used an average of the fruit cost allocation percentages used by TIPCO et al. As a result of its investigation, Commerce found that a large part of the Thai producers' canned pineapple fruit sales - more than 90% for certain types of canned fruit sales -were below the COP.

Dissatisfied with Commerce's *Final Determination*, the Thai producers filed actions in the Court of International Trade challenging, among other issues, Commerce's decision concerning fruit cost allocation. The court concluded that Commerce erred in its decision to rely upon the financial accounting records of TIPCO et al. It concluded that the "plaintiffs have demonstrated that the allocation formulas are unrelated to actual cost," and that "[a]lthough Commerce repeatedly noted the unreliability of the Thai plaintiffs' allocation methodologies, it continued to employ them simply because they were consistent with Thai GAAP." *See Thai Pineapple I*, 946 F. Supp. at 19-20. The court, relying on *IPSCO, Inc. v. United States*, 965 F.2d 1056 (Fed. Cir. 1992) (*IPSCO III*), remanded the case to Commerce "to accept the weight-based allocation methodologies put forth by the Thai plaintiffs [TIPCO et al.] and Dole if they are otherwise acceptable, because these are cost, not price-based, methodologies, or it may rely on another non-output price-based cost allocation methodology." *Thai Pineapple I*, 946 F. Supp. at 24.

On remand, Commerce calculated fruit costs for the Thai producers using their submitted weight-based fruit cost allocation methodologies. The Court of International Trade sustained the remand results in *Thai Pineapple II*. Appellants challenge the Court of International Trade's conclusion that Commerce wrongly allocated raw material costs in rendering its *Final Determination*. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5)(1994).

## DISCUSSION

### I.

A. The antidumping laws provide that Commerce must impose an additional duty on imported merchandise that is being sold, or is likely to be sold, in the United States at less than its fair value to the detriment of a domestic industry. See 19 U.S.C. § 1673(1)-(2) (1988),3 *Torrington Co. v. United States*, 82 F.3d 1039, 1041 (Fed. Cir. 1996). The amount of the duty to be imposed, otherwise known as the "dumping margin," equals "the amount by which the foreign market value exceeds the United States price for the merchandise." 19 U.S.C. § 1673; *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1567 (Fed. Cir. 1994).

Foreign market value is the price of the merchandise in the producer's home market or its export price to countries other than the United States. 19 U.S.C. § 1677b(a)(1); *see IPSCO III*, 965 F.2d at 1059. In the computing of foreign market value, § 1677b disregards, under specified circumstances, home or export market sales at less than the cost of production (COP). See 19 U.S.C. § 1677b(b). If home or export market sales do not yield a reliable measure of foreign market value, the statute directs computation of a constructed value (CV) in lieu of the foreign market value. *See id.* The constructed value serves as a minimum price level at which imported goods may be sold without incurring antidumping duties. *See IPSCO III*, 965 F.2d at 1059. Goods sold for less are assessed such duties in an amount designed to bring their effective price to the importer up to the minimum level. *NSK Ltd. v. United States*, 115 F.3d 965, 968 (Fed. Cir. 1997).

B. In reviewing a decision by the Court of International Trade, this court applies anew the statutory standard of review applied by that court to the agency's decision. *See PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1236 (Fed. Cir. 1992). Accordingly we will "uphold Commerce's determination unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Micron Technology, Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)).

II.

Appellants contend that the Court of International Trade substituted its interpretation of the statute for that of Commerce, and that because the statute does not address the issue of cost allocations, the court should have deferred to Commerce's reasonable interpretation of the statute.

Our review centers on whether the agency's interpretations of statutes and regulations it administers are reasonable. *See Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *Daewoo Elec. Co. v. International Union*, 6 F.3d 1511, 1516 (Fed. Cir. 1993), *cert. denied*, 512 U.S. 1204 (1994). We have held that Commerce is the "master of antidumping law," and reviewing courts must accord deference to the agency in its selection and development of proper methodologies. *See Daewoo*, 6 F.3d at 1516; *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996) (This court "accords deference to the determinations of the agency that turn on complex economic and accounting inquiries."). The methodologies relied upon by Commerce in making its determinations are presumptively correct. *See Fujitsu*, 88 F.3d at 1044. Even if it is possible to draw two inconsistent conclusions from evidence contained in the record, this does not mean that Commerce's findings are not supported by substantial evidence. *See id.*

During the administrative proceeding, Commerce calculated COP and CV. The statute does not specifically define COP, but the regulations state that it is "based on the cost of materials, fabrication, and general expenses, but excluding profit, incurred in producing such or similar merchandise." See 19 C.F.R. § 353.51(c); *IPSCO III* at 1060. Constructed value is generally defined as "the combined cost of materials, fabrications or other processing of any kind, general expenses and profit, and other incidental shipping expenses." *IPSCO III* at 1059.[4] "The cost of materials

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[4] [T]he constructed value of imported merchandise shall be the sum of –

encompasses the cost of raw components in the manufacturing process." *Id.* Both calculations required Commerce to determine the cost of materials. See 19 C.F.R. § 353.51(c); 19 U.S.C. § 1677b(e)(1)(A).

In order to determine the material cost for canned pineapple fruit Commerce had to allocate the pineapple fruit costs between canned pineapple fruit and pineapple juice (which was not a subject of investigation). The statute does not expressly authorize any specific allocation methodologies between items produced jointly. *See IPSCO III* at 1060. As a general rule, an agency may either accept financial records kept according to generally accepted accounting principles in the country of exportation, or reject the records if accepting them would distort the company's true costs. *See NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1206 (Fed. Cir. 1995).[5] Because the parties agree that the Thai producers' books and records were consistent with Thai GAAP, we need only consider whether Commerce was reasonable in accepting the allocation methodologies as reflected in the books and records of TIPCO et al.

A. TIPCO et al.

TIPCO et al. contend that their allocation methodologies used in the normal course of their businesses do not account for fluctuations in relevant costs or prices, and

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(A) the cost of materials (exclusive of any internal tax ... ) and of fabrication or other processing of any kind employed in producing such or similar merchandise ...
(B) an amount for general expenses ... and
(C) the cost of all containers and coverings of whatever nature .... 19 U.S.C. § 1677b(e)(1).

5 We note that this rule is now codified in 19 U.S.C. § 1677b(f)(1)(A)(1 996):

Costs shall normally be calculated on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country (or the producing country, where appropriate) and **reasonably** reflect the cost associated with the production and sale of the merchandise .... (Emphasis added).

are not based on any actual company experience. They assert that their allocation formulas have no basis in fact, or are based on rough estimates, averages, and standard numbers.

In reviewing the allocation methodologies of TIPCO et al., Commerce noted that their normal allocation methodologies were relatively consistent, allocating a range of 82 to 91% of the pineapple fruit costs to canned pineapple fruit production, and 9 to 18% to production of juice products, and thus recognized that some measure of value existed for the portion of the pineapple fruit used for juice production. Furthermore, the description of the production process provided to Commerce by TIPCO et al. reflects a distinction in the quality and portions of pineapple fruit used to produce canned pineapple fruit and juice that is consistent with the normal allocation in their books and records.

Commerce also found the books and records of TIPCO et al. to be reasonably reflective of their costs because their normal allocation methodologies were used for a number of years, accepted by independent auditors and historically relied upon to present important financial . information to shareholders, lenders, tax authorities, auditors, and other third parties. In considering the contention. that the normal allocation methodologies were designed to achieve certain managerial and tax goals, Commerce stated that records constructed for these reasons were not necessary unreliable or unreasonable, especially in light of their acceptance by independent auditors. Finally, Commerce noted that the Thai producers "did not provide any examples of companies that use weight-based fruit cost allocations as the basis for financial or managerial reporting." *Final Determination* at 29562.

TIPCO et al. argue further that Commerce's deviation from their records with respect to sugar costs, direct labor costs, fruit receiving and common processing costs, plantation overhead costs, animal feed, and asset sales is an indication of the unreasonableness of Commerce's reliance on their normal allocation methodologies. Commerce points out, however, that the Thai producers' records did not provide at all, or provided only minimally, for allocation of the above shared costs that it

allocated between canned pineapple fruit and other pineapple products. Thus, Commerce had to allocate costs that were not already allocated, or were not deemed accurately allocated, between canned pineapple fruit and other products. Moreover, with respect to fruit receiving costs, TIPCO et al. requested that Commerce reallocate costs because their allocations assigned all these costs to canned pineapple fruit.

In making its determination, Commerce noted that

> [it] generally prefers to rely on costs calculated in a manner consistent with the (Thai producers'] normal accounting methodologies and historically utilized by the company. This does not suggest[] that [Commerce] will rigidly adhere to each of [the Thai producers'] normal accounting practices, particularly when such practices are deemed inappropriate or imprecise for purposes of computing costs in an antidumping proceeding. In those circumstances, [Commerce] will make certain adjustments that capture more accurately the costs incurred by [the Thai producers'] during the period of investigation or review.

J. A. at 594 (Department of Commerce Concurrence Memorandum of May 26, 1995, at 38). To the extent that the records of TIPCO et al. reasonably reflect the costs of production, Commerce may rely upon them. *See, NTN Bearing Corp.*, 74 F.3d at 1206. Conversely, if the records are not reasonably reflective of cost, Commerce may appropriately deviate from them. *See id.* Commerce found it necessary to pursue the latter course when it deviated from the books and records with respect to the shared costs cited by TIPCO et al.

As to the raw material costs, however, the relative consistency of the allocation methodologies, the historical reliance by TIPCO et al. on their books and records, and the acceptance of these records by independent auditors support Commerce's determination to rely on the normal allocation methodologies of TIPCO et al. Antidumping investigations are complex and complicated matters in which Commerce has particular expertise and thus, Commerce's determinations are entitled to deference. *See Chevron*, 467 U.S. 837, 844. We

conclude, therefore, that Commerce's reliance on the books and records of TIPCO et al. was reasonable and is supported by substantial evidence.

TIPCO et al. also argue that our decision in *IPSCO III* requires allocation of pineapple fruit costs to be made on the basis of weight and that the Court of International Trade's decision is, therefore, proper. This argument is also made by Dole. We discuss this issue in Section III below.

B. Dole

Dole agrees that its normal allocation methodology, allocating 100% of the pineapple fruit cost to canned pineapple fruit, was distorted because it resulted in an overstatement of the cost of production for canned pineapple fruit. Dole, however, argues that the Court of International Trade correctly applied this court's holding in *IPSCO III* to reject Commerce's decision to rely on the normal allocation methodologies of TIPCO et al.

In its *Final Determination*, Commerce concluded that Dole's normal allocation methodology resulted in an unreasonable allocation of all of the pineapple fruit costs to canned pineapple fruit. Commerce noted the relative consistency of the range of allocation percentages used by TIPCO et al., and determined that other companies in the Thai industry recognized some measure of value existed for the portion of the pineapple fruit used in juice production. Commerce also noted that Dole occasionally purchased some quantity of small pineapple fruit, at a discounted price, for the specific purpose of making juice products. Commerce concluded that the purchase of the smaller pineapples indicated that Dole should recognize some value for the portion of the raw pineapple fruit used for juice. As a result, Commerce used an average of the fruit cost allocation percentages used by TIPCO et al. to calculate the pineapple fruit costs for Dole's canned pineapple fruit.[6]

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[6] In selecting an allocation method for Dole, Commerce considered various allocation possibilities, but concluded that the record in the investigation did not contain the data necessary to develop an allocation methodology for Dole based on historical data.

The methodologies relied upon by Commerce in making its determinations are presumptively correct. *See Fujitsu* at 1044. Although Dole challenged Commerce's use of the allocations of TIPCO et al. before the Court of International Trade, that court did not reach Dole's arguments in light of its finding that the normal allocation methodologies were not reasonably reflective of the Thai producers' costs of production. Dole has not repeated that challenge here, and thus we are not presented with any information that would rebut the presumptive correctness of Commerce's use of the TIPCO et al. average for determining Dole's cost of materials.

TIPCO et al. recognized some value existed for the portions of the pineapple fruit used for juice production. Given the relative consistency of the allocations of TIPCO et al., we are satisfied that Commerce's decision to use an average of the fruit cost allocation percentages used by TIPCO et al. to determine Dole's cost of materials for canned pineapple fruit is reasonable and supported by substantial evidence.

III.

Finally, Appellants argue that IPSCO III does not control the outcome of this case. We agree. In reversing Commerce's determination, the Court of International Trade stated that "[i]n every co-product case where output prices vary greatly among co-products, value based allocation is intuitively appealing for antidumping purposes, but is not permitted." *Thai Pineapple II*, 946 F. Supp at 22. The court held that *IPSCO III* required a weight-based or other "non-output price-based" method of allocating raw material cost between co-products and remanded the case to Commerce to make such an allocation. *See Thai Pineapple I* at 22-24 (stating that *IPSCO III* "Specifically found that Commerce's weight-based cost (non-value) methodology was correct, not just permissible").

In its *Final Determination*, Commerce found that the Thai producers had failed to demonstrate that their new allocation methodologies based on weight were more reliable than the verified and audited normal allocation methodologies of TIPCO et al. In so doing, Commerce concluded that

"[u]sing weight alone as the allocation criteria set up the illogical supposition that a load of shells, cores, and ends cost just as much as an equal weight of trimmed and cored pineapple cylinders." *Final Determination* at 29560. Commerce relied on the example of a hog, noting that "if the joint cost of a hog were assigned to its various products on the basis of weight, center-cut pork chops would have the same unit cost as pigs' feet, lard, bacon, ham and so forth. Fabulous profits would be shown for some cuts, although losses consistently would be shown for other cuts." *Id.* Because the parts of the pineapple, i.e., the cylinder, core, shells, and ends have significantly different uses and values, they are not interchangeable when it comes to canned pineapple fruit versus juice production. Commerce found that the Thai producers placed a higher value on the raw pineapple fruit which was used in the production of canned pineapple fruit, as evidenced by the lower price to suppliers of smaller pineapple fruit. *Final Determination* at 29561. As a result, Commerce found it unreasonable to value all parts of the pineapple using a weight-based allocation methodology.

*IPSCO III* involved the manufacture of oil country tubular goods (pipe). The production process yielded products of different quality, one of which was graded as prime pipe and the other as limited service pipe. Because the different pipe quality came from a simultaneous process, Commerce determined that the two types of pipe had identical production costs and therefore allocated such costs based on weight.

The Court of International Trade, however, rejected the weight-based allocation and instead required Commerce to take into account the difference in output value between the prime and limited service pipe. On remand, Commerce reallocated the costs for the prime and limited service pipe on the basis of their relative prices in the United States market.

This court rejected the value-based allocation methodology in our *IPSCO III* decision and sustained Commerce's determination that a weight-based allocation should be used. The steel pipe was manufactured from the same raw material and underwent one production process, but

that process produced two different grades of pipe. We held that it was improper for the Court of International Trade to impose what was a circular methodology, which allocated production costs based on the relative value of the finished pipe, in lieu of Commerce's presumptively correct weight-based allocation. Under the facts of that case, Commerce's use of a weight-based allocation methodology was a reasonable interpretation of the statute.

In this case, however, pineapple fruit is not a homogeneous raw material like the raw material used to make the pipe in *IPSCO III*, and the production process is entirely different for the various pineapple products produced. The whole pineapple must be reduced to its various components - cored cylinders, cores, shells and ends - prior to entering the production processes for canned pineapple fruit and juice. Although the raw material was purchased as a whole, for a set price per unit of weight, the parts of the pineapple differ in their usefulness and value.

The Court of International Trade rejected a reasonable allocation methodology which Commerce determined recognized the use and value of the raw material. The methodology used by Commerce was neither price-based nor circular. Commerce's allocation of the cost of the raw pineapple fruit between canned pineapple fruit and other products was not based on the selling price or output value of these products. Thus, unlike *IPSCO III*, the selling price of the canned pineapple fruit products was not a factor in determining the cost of raw material component in Commerce's calculation of COP and CV. Instead, Commerce's methodology reflected the raw material allocations of TIPCO et al. as shown by their books and records. Thus, under the facts of this case, we conclude that the Court of International Trade improperly held that *IPSCO III* was controlling precedent.

## CONCLUSION

Substantial evidence supports Commerce's determination that the Thai producers' normal allocation methodologies for raw pineapple fruit, as shown by their books and records, was reasonable. These allocation methodologies had been in use for a number of years, and had been consistently relied upon by the Thai producers to present important financial information to shareholders, tax authorities, and other third parties, including independent auditors. Although Commerce rejected Dole's normal allocation methodology, it was reasonable in doing so because Dole admittedly overstated the costs of canned pineapple fruit by allocating no part of the raw pineapple fruit cost to juice production. Commerce's use of the average of the fruit cost allocation percentages. used by TIPCO et al. for Dole was also reasonable because its weight-based alternative methodology was ~ not supported by the evidence. We conclude in this case that Commerce's interpretation was reasonable, supported by substantial evidence, and thus entitled to deference. For the reasons stated, the decision of the Court of International Trade is

REVERSED.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

97-1424, -1437

THE THAI PINEAPPLE PUBLIC CO., LTD., SIAM FOOD PRODUCTS PUBLIC CO., LTD., MALEE SAMPRAN FACTORY PUBLIC CO., LTD., and SIAM AGRO INDUSTRY PINEAPPLE AND OTHERS PUBLIC CO., LTD.,

Plaintiffs-Appellees,

And

DOLE FOOD COMPANY, INC., DOLE PACKAGED FOODS COMPANY, AND DOLE THAILAND, LTD.,

Plaintiffs-Appellees,

v.

UNITED STATES,
And DEPARTMENT OF COMMERCE,

Defendants-Appellants,

And

MAUI PINEAPPLE CO., LTD.,

Defendants-Appellant.

ORDER

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for rehearing and suggestion for rehearing en banc having been filed by Dole Food Company, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing en banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on November 4, 1999.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: October 28, 1999

Cc: PAUL C. ROSENTHAL, LUCIUS B. LAU
KENNETH J. PIERCE, STEVEN SCHNEEBAUM

THAI PINAPPLE CO V. US, 97-1424, 1437
(CIT - 95 - 08-01064)

THE THAI PINEAPPLE PUBLIC CO., LTD., et al., Plaintiffs, and DOLE FOOD COMPANY, INC., et al., Plaintiff-Intervenors, v. THE UNITED STATES, et al., Defendants, and MAUI PINEAPPLE CO. LTD., Defendant-Intervenor.

Consol. Court No. 95-08-01064

UNITED STATES COURT OF INTERNATIONAL TRADE

20 C.I.T. 1312; 946 F. Supp. 11; 1996 Ct. Int'l Trade LEXIS 204; SLIP OP. 96-182

November 8, 1996, Decided

SUBSEQUENT HISTORY: [***1] As Amended November 12, 1996.

DISPOSITION: ITA determination remanded.

CORE TERMS: methodology, inventory, merchandise, fruit, pineapple, pre-sale, dumping, margin, final determination, customer, accounting, course of trade, weight-based, juice, antidumping, output, duty, co-product, audited, warehouse, indirect, calculation, carrying, volume, calculating, allocate, quantity, shipment, solid, value-based

COUNSEL: Willkie, Farr & Gallagher (Kenneth J. Pierce, William B. Lindsey and Robert L. La Frankie) for plaintiffs.

Patton Boggs, L.L.P. (Michael D. Esch and John F. Cobau) for plaintiff-intervenors.

Frank W. Hunger, Assistant Attorney General, David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Matthew Bode), Stacy J. Ettinger, Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendants.

Collier, Shannon, Rill & Scott (Paul C. Rosenthal Lynn E. Duffy and Laura A. Svat) for defendant-intervenor.

JUDGES: Jane A. Restani, JUDGE

OPINIONBY: Jane A. Restani

OPINION: [**14] [*1312] OPINION *

* Footnote 6 contains bracketed confidential information which is to be deleted from publicly distributed copies.

RESTANI, Judge: This matter is before the court on a motion for judgment on the agency record by plaintiffs, [***2] The Thai Pineapple Public Co., Ltd. ("TIPCO"), Malee Sampran Factory Public Co., Ltd. ("Malee"), and Siam Agro Industry Pineapple and Others Public Co., Ltd. ("SAICO"), (collectively the "Thai plaintiffs"), and Siam Food Products Public Co., Ltd. ("Siam Food"); by plaintiff-intervenors, Dole Food Company, Inc., Dole Packaged Foods Co., and Dole Thailand, Ltd., (collectively "Dole"); and by defendant-intervenor, Maui Pineapple Co., Ltd. ("Maui") pursuant to USCIT Rule 56.2. The administrative determination under review is the final antidumping duty determination of the United States Department of Commerce ("Commerce") entitled Canned Pineapple Fruit ["CPF"] From Thailand, *60 Fed. Reg. 29,553* (Dep't Comm. 1995) (final determ. of LTFV sales) [hereinafter "Final Det."], as amended, *60 Fed. Reg. 36,775* (Dep't Comm. 1995).

The Thai plaintiffs contend that Commerce erred in using their normal accounting systems for allocation of raw material fruit costs for purposes of calculating cost of production ("COP") and constructed value ("CV") and in rejecting their weight-based allocation methodologies. Dole also claims that Commerce unlawfully rejected Dole's weight-based fruit [***3] cost allocation and, in addition, improperly substituted best information available ("BIA"), used arbitrary weighting factors in calculating the weight averaged dumping margins, improperly calculated Dole's indirect expenses, and failed to fully adjust for all expense differences. Maui argues that Commerce's decision to treat Dole's sale to Germany as outside the ordinary course of trade is contrary to law and unsupported by substantial evidence.

[*1313] In response, Commerce argues that all of its contested determinations were reasonable, supported by substantial evidence, and otherwise in accordance with law. Commerce does, however, request that the court remand this matter to Commerce so that it may use the same time period

for weighting the dumping margin for all Dole products and for Commerce to instruct the United States Customs Service ("Customs") to assess antidumping duties only upon Dole CPF from Thailand that was entered, or withdrawn from warehouse for consumption on or after February 22, 1995, the date of publication of the amended preliminary less than fair value ("LTFV") determination relating to CPF from Thailand. Commerce's latter request for a remand is not opposed and [***4] is granted.

BACKGROUND

On June 8, 1994, Maui and others petitioned Commerce and the United States International Trade Commission ("ITC"), alleging that the CPF from Thailand was being sold at LTFV. Based upon the petition, Commerce initiated an antidumping investigation. Canned Pineapple Fruit From Thailand, *59 Fed. Reg. 34,408* (Dep't Comm. 1994) (initiation of investigation).

On January 11, 1995, Commerce found preliminary dumping margins for Malee, TIPCO, and SAICO ranging from 1.12 to 9.55 percent. Canned Pineapple Fruit From Thailand, *60 Fed. Reg. 2734, 2738* (Dep't Comm. 1995) (prelim. determ.) [hereinafter "Prelim. Det."]. Commerce found a de minimis dumping margin for Dole of .30 percent. Id. On February 22, 1995, Commerce revised the preliminary dumping margin for Dole from .30 to .78 percent because Commerce found a significant ministerial error in its preliminary calculation. Canned Pineapple Fruit From Thailand, *60 Fed. Reg. 9820* (Dep't of Comm. 1995) (amended prelim. determ.).

In February and March 1995, Commerce conducted verification and in June 1995, Commerce issued its final determination finding dumping margins for Dole, TIPCO, [***5] [**15] Malee, and SAICO ranging from 2.36 to 55.77 percent. Final Det., *60 Fed. Reg. at 29,571.* On July 10, 1995, the ITC notified Commerce of its final affirmative injury determination, and on July 18, 1995, Commerce published an

amended final determination and the antidumping duty order. Canned Pineapple Fruit From Thailand, *60 Fed. Reg. 36,775* (Dep't Comm. 1995) (amended final determ. and order) [hereinafter "Amended Final Det."]. The revised final dumping margins for Dole, TIPCO, Malee, and SAICO, after correction of ministerial errors in the final determination, range from 1.73 to 51.16 percent. *Id. at 36,776.*

[*1314] STANDARD OF REVIEW

The court must sustain a final determination of Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). n1

n1 The applicable statutory and regulatory provisions in this case are those provisions as they existed on December 31, 1994, i.e., prior to the amendments made under the Uruguay Round Agreements Act.

[***6]

DISCUSSION

I. Dole's German Sale

In its preliminary margin calculations for Dole, Commerce matched all United States sales of two products (i.e., CONNUMUs 1211 and 1231) n2 to a single sale of a "similar" German product n3 (i.e., CONNUMT 1142). Final Concurrence Memorandum at 11 [hereinafter "Final Concur. Mem."]; C.R. Doc. 154; Defs.' Conf. App., Ex. 10. The United States sales of the two products together accounted for about one percent by volume of Dole's total United States database during the POI; the single German sale of the one product accounted for less than 0.01 percent by volume of Dole's total German database during the POI. Id. This accounted for over 90 percent of Dole's dumping margin. Id. Dole objected and

argued that the single German sale was outside the ordinary course of trade. Commerce agreed with Dole and excluded the sale from the calculation of FMV. Final Det., 60 Fed. Reg. at 29,562-63.

n2 "CONNUM" is the computer field name assigned to each unique product sold. "CONNUMU" indicates a United States product and "CONNUMT" indicates a third country product.

[***7]

n3 In calculating the dumping margins, Commerce relied upon sales to Germany as the basis for foreign market value ("FMV") because it determined that none of the four respondents had a viable home market. Prelim. Det., *60 Fed. Reg. at 2737;* Final Det., *60 Fed. Reg. at 29,554.*

Commerce calculates FMV by following the general method prescribed by 19 U.S.C. § 1677b(a) (1) (A) (1988):

The foreign market value of imported merchandise shall be the price, at the time such merchandise is first sold within the United States by the person for whom (or for whose account) the merchandise is imported to any other person . . .

(A) at which such or similar merchandise is sold, or, in the absence of sales, offered for sale in the principal markets of the country from which exported, in the usual commercial quantities and in the ordinary course of trade for home consumption . . . .

Id. § 1677b (a) (1) (A) (emphasis added). Under the statute,

the term "ordinary course of trade" means the conditions and practices which, for a reasonable time prior to the [***8] exportation of the merchandise which is the subject of the

investigation, have been normal in the trade under consideration with respect to merchandise of the same class or kind.

Id. § 1677(15) (1988). In determining whether a sale is outside the ordinary course of trade, Commerce must consider "all the circumstances particular to the sales in question." *CEMEX, S.A. v. United States*, 1995 Ct. Intl. Trade LEXIS 109, Slip Op. 95-72, at 6 (Apr. 24, 1995) (quotations omitted); see also Final Det., [*1315] 60 Fed. Reg. at 29,563. Furthermore, "Commerce, in its discretion, chooses how best to analyze the many factors involved in a determination of whether sales are made with in the ordinary course of trade." *Laclede Steel Co. v. United States*, 1995 Ct. Intl. Trade LEXIS 191, Slip Op. 95-144, [**16] at 6 (Aug. 11, 1995). Commerce's "analysis of these factors [is] guided by the purpose of the ordinary course of trade provision, namely, 'to prevent dumping margins from being based on sales which are not representative' of the home [or third country] market." CEMEX, S.A., Slip Op. 95-72, at 6 (quoting *Monsanto Co. v. United States*, 12 C.I.T. 937, 940, 698 F. Supp. 275, [***9] 278 (1988)).

Maui contends that Commerce's analysis failed to satisfy the legal standard for treating Dole's German sale as outside the ordinary course of trade. Maui argues that Commerce failed to consider the totality of the circumstances surrounding the sale, as required by the statute, and ignored overwhelming record evidence demonstrating that the sale was not unrepresentative when assessed against other sales in Dole's third-country sales database, including those prior to the POI. Maui argues that Commerce's decision was based upon only three factors: volume, price, and demand, which alone are insufficient grounds for finding the sale was outside the ordinary course of trade, and that Commerce erred in failing to consider other factors (e.g., merchandise standards; use of the merchandise; whether the sale was promotional or a trial sale; or whether the price of the sale was specially negotiated). Finally, Maui claims

that Commerce wrongly considered only gross unit prices rather than net prices and relied on unverified data.

The court finds that Commerce's decision to exclude Dole's German sale was reasonable and supported by substantial evidence. In making its final [***10] determination, Commerce evaluated eight factors: customers, terms of sale, volume of sales, frequency of sales, sales quantity, sales price, profitability, and market demand. Final Concur. Mem. at 13-14; see also Final Det., *60 Fed. Reg. at 29,563.* Commerce found that of the eight factors, only the first two did not support a finding that the sale was outside the ordinary course of trade and agreed with petitioners that the customer and terms of sale were not unique. Final Concur. Mem. at 13.

Commerce concluded that the other six factors, however, supported a finding that the sale was outside the ordinary course of trade. Id. at 13-14; see also Final Det., 60 Fed. Reg. at 29,563. In particular, Commerce found that:

(1) Dole's single third country sale of this product constituted an insignificant portion of its total German sale volume; (2) the sale was of a product that was sold only once during the POI; (3) the sales quantity was significantly lower than the average sales quantity for the POI; (4) the sales price was significantly higher than the average sales price charged on other CPF products sold in the same can size during the POI; (5) the profit [***11] margin realized by Dole on this particular sale was substantially higher than the weighted-average [*1316] profit earned on other sales of CPF in this can size during the POI; and (6) there was only one customer for this product in the third country market during the POI.

Final Det., 60 Fed. Reg. at 29,563; see also Final Concur. Mem. at 13-14.

Commerce properly weighed the contrary factors against the six other factors that were in favor of an outside of the ordinary course finding. These six factors have been found previously to be significant in ordinary course of trade analyses. See *Laclede Steel Co.*, Slip Op. 95-144, at 9-11 (court sustained Commerce's ordinary course of trade decision based upon consideration of sales price, profitability, market demand, terms of sale, sales quantity, sales volume, industry specifications, and special marking of merchandise); see also *CEMEX, S.A.*, Slip Op. 95-72, at 6-14 (court sustained Commerce decision based upon consideration of market demand, sales volume, sales patterns, shipping arrangements, profitability, and corporate image). Moreover, "ordinary course of trade is determined on a case-by-case basis by examining [***12] all of the relevant facts and circumstances." *CEMEX, S.A.*, Slip Op. 95-72, at 13.

Maui presents no convincing argument as to why the data relied on by Commerce was insufficient to allow Commerce to assess whether the circumstances surrounding the sale was truly aberrant, other than stating the record contains no evidence that demonstrates that the sale was a "trial sale" or affirmatively establishes the sale as non-representative outside the confines of the POI. [**17] The court finds that Commerce sufficiently examined the totality of the circumstances surrounding the German sale by analyzing the six month POI. Commerce determinations, whether in an investigation or an administrative review, are based upon record evidence for that particular segment of the proceeding.

Maui further argues that Commerce should have considered net unit price instead of gross unit price as it is agency practice to rely on net unit prices to make "apples to apples" comparisons between transactions regardless of individual sales terms. In terms of net unit prices, Maui claims that the net price of the sale is not markedly different from that of the next most similar merchandise. See Maui's Mot. For [***13] Summary J. on the Agency R. at 21 & Ex. 1. If Commerce had

relied on net prices, Maui contends that the sale in question stood less than 30 percent higher than the next most similar merchandise as compared to the more than 80 percent difference in gross prices relied upon by Commerce. Id. at 21. Maui also contends that Commerce's reliance on gross unit prices distorted the profitability of the German sale.

Commerce, however, was making a judgment about the data, not performing a full margin calculation analysis and thus, an examination of net unit price was unnecessary where Commerce considered comparison of gross unit prices sufficient. Commerce is was not required to perform a cost test analysis upon the particular sale in order to analyze the profit of this sale relative to the weighted-average profit earned upon other sales of CPF in the same can size.

[*1317] Finally, Maui argues that the sale at issue was not anomalous in terms of sales quantity because there were two other sales of relatively small quantity and although the sale was to only one customer, other products were also sold to only one customer. The court finds, however, that Commerce correctly analyzed the sale quantity [***14] of the German sale relative to the average sales quantity of the remaining sales. It was less than one percent of the normal quantities. Despite the fact that the other sales were made to only one customer, Commerce may still determine that this factor was significant in its overall analysis.

"Plaintiffs have the burden of demonstrating the sales Commerce excluded from its [FMV] calculation were **not** outside the ordinary course of trade." *Timken Co. v. United States*, 18 C.I.T. 486, 492, 852 F. Supp. 1122, 1128 *(1994)* (emphasis in original). Maui has not met this burden. Accordingly, the court finds that Commerce's decision to exclude Dole's German sale from the FMV calculation was supported by substantial evidence and in accordance with law.

II. Fruit Cost Allocation Methodologies

Commerce must compute a CV in lieu of FMV if significant sales are below cost of production. 19 U.S.C. § 1677b. The statute provides a formula for calculating CV:

The constructed value of imported merchandise shall be the sum of --

(A) the cost of materials (exclusive of any internal tax . . .) and of fabrication or other processing of any kind employed in producing [***15] such or similar merchandise . . .

(B) an amount for general expenses and profit . . .

(C) the cost of all containers and coverings of whatever nature . . . .

Id. § 1677b(e) (1). Constructed value is thus, defined as, "the combined cost of materials, fabrication or other processing of any kind, general expenses and profit, and other incidental shipping expenses." *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1059 (Fed. Cir. 1992) [hereinafter "IPSCO III"]. "The cost of materials encompasses the cost of raw components in the manufacturing process." Id. Thus, cost accounting was relevant to both Commerce's COP and CV decisions.

In addition to producing CPF, n4 Dole, TIPCO, SAICO, and Malee produce additional pineapple products, such as pineapple juice [**18] and juice concentrate, which are not covered by the scope of the investigation. These products are made from the same raw material, fresh pineapple fruit and thus, share jointly the cost of this material. No method for segregating parts of the product and costing them separately has been proposed. n5

n4 CPF is defined as "pineapple processed and/or prepared into various product forms, including rings, pieces,

chunks, tidbits, and crushed pineapple, that is packed and cooked in metal cans with either pineapple juice or sugar syrup added." Final Det., 60 Fed. Reg. at 29,553.

[***16]

n5 No party argued that juice is a byproduct, such as pineapple waste. Thus, all parties agree that a co-product methodology for allocation of joint costs is necessary.

[*1318] In the proceeding below, each of the Thai plaintiffs claimed that their normal methodology for allocating the cost of fresh pineapple fruit between CPF and non-CPF co-products resulted in distorted and inappropriate cost of production figures. As a result, Dole, TIPCO, SAICO, and Malee each reported raw material fruit costs using an alternative allocation methodology based upon the output derived weight of the fresh fruit used in the various pineapple-containing products. This methodology resulted in a significantly lower fruit cost allocation to CPF and hence, a lower COP and CV. See Final Concur. Mem. at 23.

In its final determination, Commerce rejected the Thai plaintiffs' alternative weight-based allocation methodology and instead, relied upon the pineapple fruit cost allocations as calculated pursuant to each company's normal accounting system, with the exception of Dole, because Commerce found that each Thai company's [***17] allocation methodology was consistent with Thai generally accepted accounting principles ("GAAP") and reasonably reflected the costs associated with production of CPF. See Final Det., 60 Fed. Reg. at 29,559-62. For Dole, Commerce relied upon an average of the fruit cost allocation percentages used by TIPCO, SAICO, and Malee because, although Dole's allocation methodology was consistent with Thai GAAP, Commerce found that it did not reasonably reflect the costs associated with production of CPF. *Id.* at 29,560. Juice costs were admittedly understated.

TIPCO, SAICO, and Malee claim that their normal formulas make no attempt to measure costs accurately and in fact, grossly overallocate costs to CPF. The Thai plaintiffs argue that Commerce ignored the record evidence to this effect, which makes it clear that the allocation bears no resemblance to either a weight or value-based allocation, and Commerce's use of the Thai plaintiff's normal allocation formulas was not supported by substantial evidence. Furthermore, the Thai plaintiffs assert that by utilizing accounting methodologies that distort costs, Commerce's decision violated the statutory requirement that COP and CV be based [***18] on actual costs and thus, was not in accordance with law. See *IPSCO III*, 965 F.2d 1056 (requiring weight-based allocation of costs among joint pipe products).

The legislative history of the antidumping statute states that "in determining whether merchandise has been sold at less than cost, [Commerce] will employ accounting principles generally accepted in the home market of the country of exportation if [Commerce] is satisfied that such principles reasonably reflect the variable and fixed costs of producing the merchandise." H.R. Rep. No. 93-571, at 71 (1973). Commerce asserts that its normal practice is to adhere to an individual firm's recording of costs in accordance with the GAAP of its home country if Commerce is satisfied that such principles reasonably reflect the costs of producing the subject merchandise. Final Det., 60 Fed. Reg. at 29,559. Commerce maintains that the rationale behind this practice is that normal accounting practices should, in most circumstances, provide an objective standard by which to measure costs, while allowing the [*1319] respondents a predictable basis on which to compute those costs. Id. In those instances in which Commerce determines that [***19] a company's normal accounting practices result in an unreasonable allocation of production costs, however, it will make certain adjustments or use alternative methodologies that more accurately capture the costs incurred. Id.

It is not disputed that TIPCO, SAICO, and Malee's normal fruit cost allocation methodologies were consistent with Thai GAAP. TIPCO, SAICO, and Malee argued, however, that their normal allocation methodologies do not reasonably reflect costs, because the methodologies were designed to achieve certain managerial goals as opposed [**19] to providing accurate cost information. n6 Id. Commerce, however, found that while these reasons may have been factors in the companies' selection of the methodologies, this does not make the methodologies, or their resulting allocations, unreasonable, particularly where a company's accounting methodology had been approved by independent auditors. *Id.* at 29,560.

n6 [ ]

To support this position, Commerce cites *Hercules, Inc. v. United States*, 11 [***20] C.I.T. 710, 673 F. Supp. 454 (1987). In *Hercules*, the court upheld Commerce's decision to rely upon COP information from respondent's normal financial statements maintained in conformity with GAAP. 11 C.I.T. at 755, 673 F. Supp. at 490. The respondent, SNPE, had argued that the accelerated depreciation method employed in its financial statements and records was for tax purposes and did not accurately reflect SNPE'S actual costs. Id. Consequently, SNPE submitted recalculated depreciation expenses under a straight-line methodology. Commerce rejected this alternate allocation methodology, which was based upon unverifiable allegations that straight-line depreciation methodology would more accurately reflect actual costs, in favor of the information contained in SNPE's verified normal records and audited financial statements. 11 C.I.T. at 755-56, 673 F. Supp. at 490-91. Commerce claims that in the present case, as in *Hercules*, Commerce chose to rely on verified and independently audited normal allocation methodologies, rather than the respondents' unverified alternative methodologies. Final Det., 60 Fed. Reg. 29,560.

Here, however, plaintiffs have demonstrated that the [***21] allocation formulas are unrelated to actual cost. The allocation formulas used in the normal course of business do not vary regardless of changes in raw fruit prices, finished goods prices, input materials' utilization efficiencies, or relative production output. See Hearing Transcript at 34. Only Malee allocates according to some notion of either cost or value. It allocates more than 80 percent of fruit costs to solid products and less than 20 percent to juice products. See Malee Sec. D Resp. at 28 (Dec. 23, 1994); C.R. Doc. 56; Pls.' Conf. App., Ex. 12; see also Cost Verification Report for Malee (Apr. 6, 1995) at 6; C.R. Doc. 118; Pls.' Conf. App., Ex. 13. n7 The [*1320] cost verification exhibits show that this formula is based on rough estimates, averages, and standard numbers, rather than actual cost or sales records, and like the TIPCO and SAICO approaches it takes no account of fluctuations in relevant costs or prices. See Malee Sec. D Resp. at 28.

n7 SAICO and TIPCO's normal allocations were approximately midway between Malee's and Dole's.

[***22]

Commerce explicitly recognized the lack of a factual basis in SAICO's case. Commerce stated that:

In SAICO's normal accounting system, pineapple fruit costs are allocated on a basis which is purely nominal and has no basis in fact.

Cost Verification Report for SAICO at 17 (Apr. 4, 1995); C.R. Doc. 111; Pls.' Conf. App., Ex. 7.

The Thai plaintiffs also argue that although they have utilized these allocation formulas for several years, this fact does not make the allocation formulas any less distortive of actual costs for the purposes of antidumping law. See Final Det., 60 Fed.

Reg. at 29,559 (Commerce "found that each company had used its recorded fruit cost allocation methodology for at least a number of years").

The Thai plaintiffs argue further that Commerce acted inconsistently when it deviated from the Thai plaintiffs' normal accounting practices on several occasions in calculating COP and CV in the underlying investigation without factually distinguishing why it was appropriate in those occasions but not for fruit costs. Commerce admits that in certain instances (fruit receiving and common processing costs, sugar costs, plantation overhead costs, [***23] and direct labor costs) do represent departures from the Thai plaintiffs' normal accounting records, but states these adjustments were necessary because the companies' normal records did not provide at all, or provided only minimally, for [**20] allocation of these shared costs between CPF and other pineapple products.

The court finds that Commerce erred in its determination to rely on the Thai plaintiffs' normal accounting practices to allocate fruit costs. Whether or not those methodologies were consistent with Thai GAAP, the court finds that the methodologies do not reasonably reflect actual costs as required by the statute. The methodologies are arbitrary and reflect neither the cost of the inputs nor any credible measure of the value of the outputs, as Commerce appears to recognize. Although Commerce repeatedly noted the unreliability of the Thai plaintiffs' allocation methodologies, it continued to employ them simply because they were consistent with Thai's GAAP. Furthermore, there is really no meaningful distinction between Dole's rejected "normal" methodology and the others which were accepted. Even if Malee's allocation is a very rough estimate of value it is nonetheless unreliable, [***24] and the others differ for arbitrary reasons, not because they are more accurate.

Commerce has never stated that foreign GAAP will suffice when it is unreliable. To the contrary, GAAP consistent methodologies are rejected when they do not reflect actual costs. See, e.g., New Minivans from Japan, 57 Fed. Reg. 21,937, 21,946 (Dep't Comm. 1992) (final determ. of LTFV sales). Maui's argument that respondents cannot [*1321] reject their own GAAP consistent records is incorrect. The only issue is whether the records reflect actual costs. GAAP is concerned with overall financial performance and not product specific cost allocation for antidumping purposes. Commerce should have followed its normal practice and rejected GAAP accounting records because they were unreliable and distortive of actual costs. Thus, Commerce's decision to rely on "normal" methodologies presented to it was arbitrary, capricious, not based on substantial evidence and contrary to law. The next question is what methodology or methodologies may be used.

Lurking in the background is not Commerce's desire to use distorted GAAP records, but rather its apparent change of heart regarding proper co-product cost allocation for [***25] antidumping purposes. Commerce is not seeking some "canned fruit" exception to the principle of weight/volume based allocation, as it appears to argue here. See discussion infra. It is stepping back from that methodology even in the steel area, where it vigorously supported weight-based allocation, in the past. Cf. IPSCO III (weight-based allocation of joint pipe product costs) and Certain Carbon and Alloy Steel Wire Rod from Canada, 59 Fed. Reg. 18,791, 18,795 (Dep't Comm. 1994) (final determ. of LTFV sales) (time instead of weight used to allocate steel fabrication costs; "use of tonnage . . . would result in the same cost per ton regardless of the grade of steel").

In this case Commerce has proffered a desire for a value-based allocation as between solids and juice products, although it accepted weight-based allocations among solid products. Final Det., 60 Fed. Reg. at 29,560-61 (rejecting Thai plaintiffs' weight-based allocations). As indicated, Dole's "normal"

allocation methodology was rejected and an average of Thai company allocation ratios was used. Id. But Commerce stated that for future reviews and assessments Dole's fruit costs should be allocated [***26] between CPF and pineapple juice products on the basis of historical net realizable value ("NRV"). Id. Commerce stated that:

A reasonable fruit cost allocation methodology would be one which reflects the significantly different quality of the fruit parts which are used in the production of CPF versus those which are used in the production of juice products. One approach to deriving such an allocation methodology would be to compare the net realizable value of the CPF versus juice products over a period of years. Net realizable value (NRV) is commonly defined as the predicted selling price in the ordinary course of business less reasonable predictable costs of completion and disposal.

Id. (citing Charles T. Horngren & George Foster, Cost Accounting: A Managerial Emphasis (5th ed. 1982) at 534 [hereinafter "Cost Accounting"]); see also Final Concur. Mem. at 30-31 & n.11. Commerce declined to utilize the NRV methodology in this investigation based on Dole's verified sales data from the POI because the resulting [**21] allocation percentage differed significantly from the allocation percentages used in the books of the other respondents. Final Det., [***27] 60 Fed. Reg. at 29,560. This is not a complete explanation, as will be explained. See also Final [*1322] Concur. Mem. at 30-32. Commerce also did not obtain historical information in this investigation.

The Thai plaintiffs argue that weight is the appropriate basis for allocation because it is on the basis of weight that fruit costs are actually incurred. They claim that they purchase raw pineapple on a Thai baht per kilogram basis and that cost is the same for a kilogram of higher quality raw material used to

make choice grade slices as it is for a kilogram of lower quality raw material used to make juice.

Commerce, however, stated that, "because the parts of the pineapple are not interchangeable when it comes to CPF versus juice production, it would be unreasonable to value all parts equally using a weight-based allocation methodology." Final Det., 60 Fed. Reg. at 29,561. Commerce likens the situation to that of a hog, where if the joint costs of a hog were assigned to its various products based on weight, center-cut pork chops would have the same unit cost as pigs' feet, lard, bacon, ham, etc., resulting in large profits for some cuts and consistent losses shown for others. [***28] *Id.* at 29,560. The hog example is found in Donald E. Keller, Management Accountants' Handbook (4th ed. 1992) at 11:2 [hereinafter "Keller"]. Commerce reasons that like the hog, the pineapple is comprised of various parts, i.e., the cylinder, core, shells, etc. with different uses and values. Final Det. at 29,560-61. Commerce also noted that authoritative accounting literature provides examples of cost allocations in the canning industry dependent on two factors, a quantitative factor and a qualitative factor. Id. at 29,561 (citing Keller at 11:13). Commerce stated that:

The output of finished products can be captured in the quantitative measure, which is used to allocate the direct preparation labor costs and other costs directly related to the quantity of raw fruit processed. The difference in the relative quality of the fruit used in each product is reflected in a qualitative factor, which is used to allocate the purchase cost of raw materials among products. The various grades or parts of the fruit are assigned a factor reflective of the quality of the fruit used for each product. With all of this in mind, we believe it is inappropriate to [***29] allocate fresh pineapple fruit costs to the various pineapple products solely on the basis of weight.

Id. n8

n8 Commerce does not propose and no party here employed a fact-based unitary value/weight ratio for fruit allocation purposes.

The accounting citation is incorrect. It merely discusses the advantages of value-based allocation for normal costing purposes without discussing how to allocate in the canning industry specifically. n9 The Thai plaintiffs claim that, while pineapple parts are not interchangeable, this fact is irrelevant because although the value of different pineapple parts may be different, the cost is all the same. The Thai plaintiffs do admit [*1323] that the pineapple meat from which juice primarily is made is of a lower quality than the material used to make many, though not all, solid products, and because solid products have a higher market value than juice products, it can be said that the juice raw material has a lower value than at least some canned pineapple raw material. [***30] They argue, however, that they pay the same cost when they buy pineapples regardless of the mix of higher- and lesser-valued products ultimately processed.

n9 An article referred to in Keller at 11:14 does discuss the canning industry. It suggests a qualitative approach for cost allocation for various grades of fruit. Jankowski, "Cost and Sales Control in the Canning Industry," 36 N.A.C.A. Bull. at 376 (Nov. 1954). This is the opposite of Commerce's approach here. That is, cost allocation by weight among solid pineapple products was allowed.

Dole argues that its weight-based methodology allocates fruit cost based on the weight of the net product output, e.g., only the weight of the juice pressed from the pineapple meat, and not the pulp left behind, is included in the net product weight. Therefore, [**22] Dole claims that its allocation methodology does not value all parts going on the distorted weight basis that Commerce asserts. Thus, Commerce's shells,

cores, etc. argument, as well as its hog analogy are [***31] overstated. Waste such as shells and pressed cores are given by-product treatment. Final Det., 60 Fed. Reg. at 29,566. One continuous fruit process yields a range of products from the whole fruit input. See, e.g., Malee Sec. D Resp. at 11-15; Pls.' Conf. App., Ex. 12. As indicated, among solid products including crushed pineapple (a low value solid product) cost allocation by weight was found acceptable. Thus, apparently it is only for the juice vs. solid product that Commerce proposes to use a raw fruit value-based allocation, if Thai GAAP consistent "normal" methodologies are rejected.

Dole also points out that the same accounting authorities relied upon by Commerce recognize the inappropriateness of a revenue-based or sales-price method when the purpose of the cost calculation is to validate prices:

All sales-price methods are subject to one compelling criticism. Where cost is determined by price, price cannot be determined by cost. Therefore, all sales-price methods are circular for pricing decisions and inferentially so for many other types of decisions that have sales price as a fundamental factor.

Keller at 11.18; see also Charles T. Horngren [***32] & George Foster, Cost Accounting: A Managerial Approach at 532 (7th ed. 1991) (stating, "physical measures are sometimes preferred to sales value methods in rate-regulation settings when the objective is to set a fair selling price. Why? Because it is circular reasoning to use selling prices as a basis for setting a selling price, as would be the case under the sales value at split-off method"). n10

n10 Although rate regulation per se is not involved here, antidumping laws relate to price setting, and, thus, are analogous.

If joint inputs could be as easily distinguished as Commerce claims, there would be no need for allocation. In every co-product case where output prices vary greatly among co-products, value based allocation is intuitively appealing for antidumping purposes, but it is not permitted. In *IPSCO, Inc. v. United States*, 13 C.I.T. 402, 405-06, 714 F. Supp. 1211, 12-13-15 (1989) [hereinafter "IPSCO II"], this court addressed the [*1324] issue of how to allocate joint costs between co-products [***33] -- "prime" and "limited-service" steel pipe or oil country tubular goods ("OCTG"). n11 In the underlying investigation, Commerce allocated material, labor, and overhead costs uniformly to prime and limited service pipe because there was no ascertainable distinction in the costs actually incurred in producing these two products. 13 C.I.T. at 405, 714 F. Supp. at 1215. This court rejected Commerce's methodology, remanding the case with instructions to account for output value differences in allocating costs, as Commerce would do here, first by accepting Malee's rough value allocations and second, by proposing an historic NRV methodology for Dole. The court stated that, "by declining to account for differences in value and treating prime and limited service products identically in its calculations of foreign market value, [Commerce] made an unreasonable fair value comparison." Id. Following IPSCO II on remand, Commerce allocated costs between prime and limited-service pipe based on relative sales value. IPSCO III, 965 F.2d at 1061. This court approved that result.

> n11 Prime OCTG meets American Petroleum Institute ("API") standards and sells at premium prices, whereas limited-service OCTG does not meet API standards tolerances and therefore sells at a discount. See *IPSCO III*, 965 F.2d at 1057-58.

[***34]

The Federal Circuit reversed this court's *IPSCO II* decision, found that a value-based allocation violated the antidumping

statute, and also found that Commerce's original weight-based methodology was the correct interpretation of the law. *IPSCO III*, 965 F.2d at 1060-61. The appellate court in *IPSCO III* noted that, "the broad language of section 1677b(e) does not at any point expressly authorize adjustment of these production costs to account for products of a lower grade or less value." Id. The court then found that the legislative history of Title [**23] 19 "confirms the statute's unambiguous intent to provide cost of production as an independent yardstick for deciding whether home and export sales prices are suitable for fair value comparisons." Id.

The Federal Circuit found that calculating costs for both limited-service and prime products on the basis of their relative prices in the United States market was unreasonable and circular as "the selling price of pipe became a basis for measuring the fairness of the selling price of pipe." *Id.* at 1061. The court stated that, "this circular reasoning contravened the express requirements of the statute which set [***35] forth the cost of production as an independent standard for fair value." Id. Additionally, the Federal Circuit found that as Commerce's original weight-based methodology was a consistent and reasonable interpretation of the statute, this court erred in substituting "its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Id. (quoting *Chevron U.S.A. v. Natural Res. Defense Council*, 467 U.S. 837, 844, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)). Thus, the Thai plaintiffs and Dole claim that the holding in *IPSCO III* prohibits Commerce from shifting costs from one co-product to the other simply because there is a difference between them in market values, and despite the appellate [*1325] court's final statement on this issue, the entire opinion speaks of no statutory ambiguity.

In its final determination, Commerce concluded that "contrary to respondents' arguments, however, *IPSCO* is not controlling in this case." Final Det., 60 Fed. Reg. at 29,561. Commerce claims that *IPSCO* did not hold that in every

instance value-based allocations are legally impermissible and attempts to distinguish *IPSCO* on its [***36] facts. See id. Commerce notes that in *IPSCO*, "there were no physical differences between the two grades of pipe, only differences in quality and market value." Id.; see *IPSCO III, 965 F.2d at 1058.* Commerce also states, "the same materials, labor, and overhead went into the manufacturing lot that yielded both grades of pipe." *IPSCO III, 965 F.2d at 1058.* Commerce allocated production costs equally between the two grades of pipe because they were produced simultaneously and had identical production costs. Id. Commerce argues that *IPSCO III* suggests that the courts will defer to Commerce's preference for reliance upon respondents' normal allocation methodologies, particularly where there are significant differences in raw material, i.e., the primary use of the cylinder in the production of CPF and the additional use of the shells, cores, and ends, in the production of juice and concentrate, as well as differences in processing, labor, and overhead. See Final Det., 60 Fed. Reg. at 29,561.

The Thai plaintiffs counter that Commerce's attempt to distinguish *IPSCO III* fails because although in *IPSCO III* materials, labor, and overhead costs were shared, [***37] whereas in this case, there are clear differences in labor and overhead costs, this fact is immaterial because the issue of cost allocation in this case pertains only to shared raw material costs. They are correct. They also claim that all pineapple using co-products incur identical baht per kilogram fruit costs, just as prime and limited service pipe incurred identical material, labor, and overhead costs. The Thai plaintiffs argue that to the extent that co-products have shared costs that are incurred uniformly, they should be allocated uniformly. Further, the Thai plaintiffs assert that in IPSCO III, as in this case, it is impossible to separate out the different quality inputs before the costs are incurred. Instead costs are incurred uniformly and all at once, at the exact same rate for high quality inputs as for low quality inputs. The Thai plaintiffs contend that Federal Circuit in *IPSCO III* held that in these circumstances, costs

must be allocated uniformly among the resulting high-value and low-value products.

As indicated, the court finds that Commerce overstates distinctions with *IPSCO III* and to some extent it also misstates the facts of this case, as explained [***38] previously. See *supra* at 23. The court finds that Commerce may not rely on output price-based allocation methodologies given the holding in *IPSCO III*. *IPSCO II* allowed Commerce to choose between any number of value-based methodologies. *IPSCO II*, 13 C.I.T. at 406 n.6, [**24] 714 F. Supp. at 1215 n.6. The Federal Circuit approved none of those methodologies. Ascertaining actual costs per product is just as impossible for pineapple co-products as it was for pipe co-products. The court [*1326] made no exceptions for intentionally produced lower value outputs, as may be the case here, and it certainly did not say that weight-based methodologies are to be used only when they work to respondents' disadvantage.

The court declines to reject the words of the Federal Circuit and to limit *IPSCO III* to its facts. The Federal Circuit specifically found that Commerce's weight-based cost (non-value) methodology was **correct**, not just permissible. It in no way suggested that Commerce had discretion to choose a value-based methodology, rather it found output price-based methodologies circular. The Federal Circuit knows how to allow Commerce discretion. See, e.g., *Federal-Mogul Corp. v. United [***39] States*, 63 F.3d 1572, 1581-82 (Fed. Cir. 1995) (Commerce may choose among any number of permissible VAT methodologies). n12 Despite the final paragraph which repeats the general rule of deference to agency decisions, fully three-fourths of *IPSCO III* is in mandatory language. The statute is declared unambiguous. Thus, no true *Chevron* deference to an agency's choice among several permissible interpretations is involved. 965 F.2d at 1060. The court must simply defer to the one correct statutory interpretation. It is a rare opinion that could not be more clearly written. The court, however, declines to dismiss the bulk of *IPSCO III* as simply

loose language. The court must assume that *IPSCO III* means what it says.

n12 The court here uses value as did the court in the *IPSCO* cases to refer to output price or net realizable value of the outputs. It does not refer to value as cost-based value.

Joint cost allocations for co-products are an accounting dilemma. No method is totally satisfactory. [***40] The *IPSCO III* court apparently decided that Congress made a choice to avoid circularity, despite the predictable distortive effects on COP and CV for some co-products. While this court may not agree that Congress made such a choice and indeed believes that the circularity problems can be controlled for, and, thus, that output price-based methodologies which avoid the worst distortions potentially caused by POI U.S. price-based allocations are permissible, this court has no authority to approve them. n13 The appellate court has spoken on this issue and only it or Congress may change the law. Accordingly, this issue is remanded. Commerce may choose to accept the weight-based allocation methodologies put forth by the Thai plaintiffs and Dole if they are otherwise acceptable, because these are cost, not price-based, methodologies, or it may rely on another non-output price-based cost allocation methodology.

n13 The decision to use historical value allocation for Dole in the future appears to be another attempt to sidestep *IPSCO III*. While *in IPSCO III* the remand decision rejected by the appellate court used a POI-based value allocation, *IPSCO III's* rejection of value-based allocations is unlimited.

[***41]

III. Weighting the Dumping Margin for Dole's United States Sales

Commerce allowed Dole to report all of its United States sales, including those of Philippine origin, for each product category for which Dole had shipments from Thailand during 1993, because Dole was unable to distinguish between its pineapple grown and canned in Thailand and its [*1327] pineapple grown and canned in the Philippines. In its preliminary and final determinations, Commerce calculated a dumping margin for Dole by weight-averaging the dumping margin for each product category according to the ratio of shipments of CPF from Thailand to total volume shipped from both Thailand and the Philippines during the last seven accounting periods of 1993, i.e., July 19 through December 31, 1993. Prelim. Det., 60 Fed. Reg. at 2736; Final Det., 60 Fed. Reg. at 29,562. Commerce used the July-December accounting period as the basis for establishing the ratio rather than the entire 1993 period because Dole reported that its average inventory turnover rate was six to seven months. Prelim. Det., 60 Fed. Reg. at 2736.

After Commerce issued its final determination, petitioners pointed out a flaw in Commerce's [***42] [**25] rationale: for certain products sold in the United States in the first half of 1994, the shipment data showed that (a) they had been shipped from Thailand to the United States only in the first half of 1993, and (b) they were not shipped at all from the Philippines to the U.S. in 1993. As a result, the sales of these products, which the petitioners emphasized showed positive dumping margins were given zero weight using Commerce's Period 7-13, 1993 shipment ratios. While describing this flaw as an error in Commerce's methodology, petitioners nevertheless asserted that the result was "unintentional," and for that reason qualified as a clerical or ministerial error that could be corrected after issuance of the final determination.

Commerce agreed that the result was "unintentional" and reasoned that its methodology:

was only intended to influence the weight assigned to the PUDD n14 calculated for those UPCs where Dole had shipments from both Thailand and the Philippines. Any elimination of PUDD values calculated on UPCs sourced exclusively from Thailand was an oversight on [Commerce's] part and was unintentional.

Ministerial Errors Decision Mem. at 6 (June 28, [***43] 1995) [hereinafter "Ministerial Errors Mem."]; P.R. Doc. 342; Defs.' App., Ex. 6. Pursuant to 19 C.F.R. § 353.28(c) (1994), Commerce recalculated Dole's dumping margin in its amended final determination so as to include products exclusively of Thai-origin that had been excluded from the final dumping calculation because they were shipped prior to the seven month accounting period examined by Commerce. See Amended Final Det., 60 Fed. Reg. at 36,776; Ministerial Errors Mem. at 4-6. For these products, Commerce used a full year 1993 weighting period as the basis for establishing the ratio; for the remaining sales, Commerce continued to use the July-December accounting period as the basis for the ratio. See Amended Final Det., 60 Fed. Reg. at 36,776.

n14 The "PUDD" (potentially uncollectible dumping duties) is the absolute amount of the dumping duties (as opposed to a percentage of volume) that would have been collected from the United States sales under investigation if an antidumping duty order had been in effect.

[***44]

Dole claims that Commerce's inconsistent use of different weighting factors in the amended final determination is arbitrary and unreasonable. [*1328] Dole argues that it is inherently arbitrary to calculate weighting factors based on an average inventory turnover for all products, but then make exceptions for individual products with different turnover ratios. Such selective application, Dole asserts, destroys the

presumed congruence between the set of products used to calculate the average and the set of products to which the results are applied. Without such congruence, the justification for using the average inventory period is lost. Dole contents that in citing examples of certain products sold in the POI but not shipped in the second half of 1993, petitioners have simply demonstrated that the July to December 1993 shipment data do not accurately represent the source of the products sold in the POI, and that a longer period should be used.

Upon reconsideration of this issue, Commerce agrees with Dole that it should have applied a consistent weighting factor across the board. The court agrees. This issue is remanded so that Commerce may use the full-year 1993 shipment volumes, supplied [***45] by Dole in its Section C Questionnaire Response, to weight the dumping margin for all Dole products.

IV. Dole's G&A Expense Factor

In its Section D Questionnaire Response, Dole computed a G&A factor based upon 1993 audited financial data for Dole Food Company, Dole Packaged Foods, and Dole Thailand. Dole Sec. D Resp. at 16 & Ex. D-12 (Dec. 19, 1994) [hereinafter "Dole Sec. D Resp."]; C.R. Doc. 52; Pl.-Intvr.'s Conf. App., Ex. 10. Dole subsequently provided a revised G&A factor based upon 1994 audited financial data for Dole Food Company and upon 1994 unaudited financial data for Dole Thailand. Dole COP/CV Verification Report at 15 (Apr. 5, 1995); C.R. Doc. 115; Pl.-Intvr.'s Conf. App., Ex. 15; and Dole Letter to Commerce (Apr. 27, 1995); P.R. Doc. 295; Pl.-Intvr.'s Conf. App., Ex. 18 [**26] (Dole Food Company, Inc.'s 1994 annual report containing audited financial statements).

In its final determination, Commerce calculated G&A expenses using Dole's 1993 audited financial information consistent with Commerce's practice of calculating G&A expenses from audited financial statements that most closely

correspond to the POI. Final Det., 60 Fed. Reg. at 29,565; see also Furfuryl [***46] Alcohol from Thailand, 60 Fed. Reg. 22,557, 22,561 (Dep't Comm. 1995) (final determ. of LTFV sales) (stating "under ordinary circumstances, the most appropriate full-year G&A period is that represented by the latest fiscal year for which the respondent has complete and audited financial statements").

Dole objects to Commerce's determination to rely on its 1993 financial statements for both Dole Food Company and Dole Thailand. Dole argues that Commerce should have based Dole's G&A expense factor upon a combination of Dole's 1993 audited financial data for Dole Thailand and Dole's 1994 audited financial data for Dole Food Company. Commerce claims, however, that this approach would have been inconsistent with Commerce's practice and policy. In calculating G&A, Commerce asserts that it is looking at a "snapshot" of expenses incurred over [*1329] the specific period of operations reported in the respondents' financial statements. Under Dole's proposed reporting methodology, Commerce claims that companies within its consolidated group would be allowed to mix and match financial data from different periods, which would defeat the snapshot approach to Commerce's G&A factor calculation.

Dole [***47] counters that, unlike a snapshot, which records the situation at a given moment in time, a full-year record of G&A expenses captures all such expenses incurred over the full fiscal year, thereby capturing both recurring daily expenses and periodic annual expenses. Such expenses, Dole contends, will change from year to year for a company, particularly where one-time restructuring expenses are incurred. Dole also argues that the mere possibility that in some cases a respondent might attempt to manipulate its data by withholding release of audited annual reports does not support creation of an irrebuttable presumption that such manipulation occurs in every case.

The court agrees with Commerce that Dole's proposed methodology would lead to inconsistent practices and, in fact, is contrary to Dole's position that a consistent time period must be used in regard to margin weighting. Commerce's determination to rely on the audited 1993 financial reports for Dole Food Company and Dole Thailand was reasonable and otherwise in accordance with the law. Accordingly, the court affirms Commerce's determination in regard to Dole's G&A expense factor.

V. Dole's Inventory Carrying Cost [***48]

Inventory carrying cost measures the imputed cost incurred by a company for storing merchandise in inventory. Commerce is unable to calculate the actual cost for inventory carrying costs because such costs are not found in a company's books. Thus, Commerce imputes the opportunity cost of holding the merchandise in inventory prior to the sale to an unrelated customer. Commerce deducts inventory carrying costs, measured from the date of production is completed through the date of shipment to an unrelated customer, from exporter sales price and FMV. See *Torrington Co. v. United States*, 44 F.3d 1572, 1579-81 (Fed. Cir. 1995) (upholding this practice).

With respect to the interest rate used to calculate inventory carrying cost, Commerce explains that its practice is to use the short-term rate in the currency in which the cost of the inventory is incurred by the entity that bears the costs of producing or acquiring such inventory. See, e.g., Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan, 57 Fed. Reg. 4975, 4984 (Dep't Comm. 1992) (final results) [hereinafter "TRBs Final Results"]. If there is evidence, however, that [***49] an entity other than the one holding the merchandise in inventory bears the cost of carrying the merchandise for a portion of the time the merchandise is held in inventory, Commerce will use this entity's short-term interest rate to calculate that portion of the inventory carrying cost. Id. For example, [**27] in TRBs Final

Results, Commerce [*1330] used the Japanese parent company's short-term interest rate to calculate United States inventory carrying cost because the payment terms that the parent company extended to its United States subsidiary indicated that the parent company bore the cost of maintaining the inventory in the United States. Id.; see also *Timken Co. v. United States*, 18 C.I.T. 942, 948-49, 865 F. Supp. 881, 886-87 (1994) (upholding this determination).

Here, in reporting inventory carrying cost, Dole applied a United States dollar denominated short-term borrowing rate to the actual cost of manufacture of the inventory for the time that the merchandise was held in inventory in the United States, Thailand, and Germany. See Final Concur. Mem. at 4-5. In its final determination, Commerce recalculated Dole's inventory carrying cost for the time that the merchandise [***50] was held in inventory in Thailand using a Thai baht-denominated, short-term borrowing rate. Final Det., 60 Fed. Reg. at 29,554, 29,556; see also Final Concur. Mem. at 5. For the time that the merchandise was on the water and in inventory in the United States or Germany, Commerce used the United States dollar-denominated, short-term borrowing rate supplied by Dole and confirmed by Commerce at verification. Final Det., 60 Fed. Reg. at 29,554, 29,556.

Dole contends that Commerce improperly substituted an imputed baht interest rate for Dole's actual dollar cost of borrowing in calculating Dole's inventory carrying cost. Dole argues that Dole's use of Dole Food Company's actual dollar-denominated short-term cost of borrowing as the applicable rate of interest was consistent with Commerce's then-prevailing practice under *LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 460-61 (Fed. Cir. 1990), of calculating both credit expenses and imputed interest expenses using the lowest borrowing rate available to the respondent. See also Class 150 Stainless Steel Threaded Pipe Fittings from Taiwan, 59 Fed. Reg. 38,432, 38,434 (Dep't Comm. 1994) (Commerce "is [***51] required to use the lowest rate at which the

respondent has borrowed or to which the respondent has access"). Dole asserts that the court in LMI-La Metalli recognized that it defies commercial reality to presume that a company would borrow at a high home currency interest rate when a lower dollar rate is available. See *LMI-La Metalli*, 912 F.2d at 460 (stating, "we agree with LMI that it is not reasonable to presume that a commercial enterprise would borrow at almost twice the available rate").

Dole claims that in its final determination, Commerce adopted a modified methodology for calculating imputed credit costs, and then extended that methodology to inventory carrying costs. Dole argues that Commerce failed to properly apply its own stated methodology, which applies an interest rate using the currency of the pending transaction. Dole contends that because all of Dole Thailand's export sales are in U.S. dollars, it is the cost of holding inventory pending receipt of U.S. dollars that defines the relevant currency under that methodology. Dole also points out that as a Thai corporation, Dole Thailand keeps its [*1331] day-to-day financial statements in baht in fulfillment of local [***52] statutory requirements, but as a subsidiary of Dole Food Company, Dole Thailand also prepares dollar-denominated financial statements, which are used to consolidate its financial position in the financial statements of Dole Food Company. Finally, Dole claims that the imputation of a higher baht-denominated interest rate is inconsistent with commercial reality and Dole Thailand's own borrowing practices. Dole claims the current liabilities consist overwhelmingly of payables to affiliates (approximately 80% of total current liabilities), with only about 3% of total current liabilities in debt to banks, which might be local debt. Dole Sec. D. Resp., Ex. D-4. Accordingly, Dole argues that the imputed cost of holding finished goods inventory is borne by the consolidated Dole group, and is properly calculated based on the lower dollar-based cost of borrowing available to Dole Food Company.

Commerce counters that there is no record evidence to corroborate Dole's statement that the imputed cost of holding finished goods inventory in Thailand is borne by the consolidated Dole group. In contrast, Commerce noted that in *Timken Co.*, specific [**28] payment terms, allowing for delayed payment [***53] for the imported merchandise, formed the evidentiary basis for Commerce's conclusion that the American subsidiary could have benefitted from its Japanese parent's ability to borrow money in Japan. 18 C.I.T. at 948-49, 865 F. Supp. at 886-87. Dole's contentions have not been adequately addressed. If Dole's borrowings are largely in U.S. dollars because they are debt to U.S. affiliates, such specific evidence would seem to be similar to that accepted in *Timken*. Commerce must address these arguments and make a rational determination. Accordingly, the court finds that Commerce's determination in this respect not supported by substantial evidence and it is remanded.

VI. Dole's Pre-Sale Movement and Import Duty Expenses

Dole reported pre-sale movement and import duty expenses for its third country sales. In its final determination, Commerce concluded that Dole's third country movement and import duty expenses did not bear a direct relationship to the sales under consideration and, therefore, could not be deducted fully as an ordinary circumstance-of-sale ("COS") adjustment pursuant to 19 U.S.C. § 1677b(a)(4)(B) and 19 C.F.R. § 353.56(a)(1) (1994). Final Det., 60 Fed. [***54] Reg. at 29,563-64. Commerce also concluded that to treat similar United States movement and import expenses as indirect expenses for purposes of the ESP offset cap would be contrary to 19 U.S.C. § 1677a(d) (2)(A). See *Sharp Corp. v. United States*, 63 F.3d 1092, 1097 (Fed. Cir. 1995). n15 Thus, the advantage to be gained through the ESP offset to FMV for indirect expenses was limited.

n15 The *Sharp* decision sets forth the background of the ESP offset and ESP offset cap.

[*1332] Dole argues that the pre-sale movement and import duty expenses are directly related to its third country sales and, as such, should have been deducted fully from FMV. To determine whether pre-sale movement expenses are direct, Commerce examines the respondent's pre-sale warehousing expenses because Commerce considers the pre-sale movement charges incurred in positioning the merchandise at the warehouse to be linked, for analytical purposes, to pre-sale warehousing expenses. Final Det., 60 Fed. Reg. at 29,563; see also The Ad Hoc [***55] *Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 1995 Ct. Intl. Trade LEXIS 129, Slip Op. 95-91 at 5-6 (May 15, 1995), *aff'd*, 95 F.3d 1164 (Fed. Cir. 1996) (unpublished table decision). Commerce explains that it typically "treats expenses associated with inventory that is held for purposes of production planning and being able to ship the merchandise quickly with a regular turnover as indirect selling expenses because this inventory is maintained by the company as a service to all customers." Final Det., 60 Fed. Reg. at 29,563. Commerce acknowledges, however, that in limited circumstances, it does recognize certain pre-sale expenses as direct. Id. For freight and warehouse expenses, Commerce claims that those circumstances usually involve products channeled or customized for certain buyers. See, e.g., Stainless Steel Bar From Italy, 59 Fed. Reg. 66,921, 66,928-29 (Dep't Comm. 1994) (final determ. of LTFV sales) (allowing COS adjustment where pre-sale warehousing expenses incurred for designated amount of subject merchandise with certain specifications for particular customers).

In the present case, Dole reported two types of third country [***56] warehousing expenses: (1) those associated with moving the merchandise "in and out" of the warehouse; and (2) warehouse storage charges. Dole Sec. B Resp. at 11-12 (Sept. 20, 1994); P.R. Doc. 90; Defs.' App., Ex. 9. Commerce found that Dole had not provided evidence to substantiate its claim that either pre-sale warehousing expense was directly

linked to the sales under investigation. Final Det., 60 Fed. Reg. at 29,564. Commerce listed its reasons as follows:

(1) The amount of time that passes between the date the merchandise arrives at the European warehouse and the date it is shipped to the third country customer; (2) in most instances the third country sales were made from inventory . . .; (3) the merchandise held in the European warehouses is not pre-designated for sale to a specific customer; (4) the merchandise [**29] sold from inventory was not specialty merchandise . . .; (5) the merchandise that was held in inventory was sold to numerous third country customers during the POI; (6) Dole incurs the cost of pre-sale warehousing expenses, not the customer . . .; and (7) in its questionnaire response Dole did not claim the warehouse storage charges as direct selling expenses; [***57] rather, Dole characterized warehouse storage costs as indirect expenses.

[*1333] Id. Thus, Commerce concluded that because Dole's third country pre-sale warehouse expenses were indirect, the expenses involved in moving the merchandise to the warehouse were also indirect. Id.

Dole contends that unlike other types of selling expenses, such as general advertising or sales staff salaries, third country movement expenses are directly tied to subsequent individual sales of the products because they add value directly to the individual articles sold. Dole claims that it is indisputable that to the German customer, a shipment sold delivered, duty paid in Germany has greater value than a shipment sold FOB Bangkok. Dole argues that by moving goods from Thailand to Germany and paying 24 percent ad valorem import duties, Dole has added identifiable value to those goods and upon their subsequent sale, that value is transferred to the customer. Dole likens this situation to selling costs incurred by the producer that inure to the benefit of the purchaser, such as advertising expenses "assumed by the producer . . . on behalf

of the purchaser." See 19 C.F.R. § 353.56(a) (2). [***58] Dole distinguishes this situation from that in Ad Hoc Committee, Slip Op. 95-91, where the movement was of inventory from the factory to the warehouse in the home market, which Dole argues is neither designated to any specific market nor significantly advanced in value. This distinction is not meaningful. Presumably both direct and indirect expenses add value to the merchandise. Indirect expenses are not ignored, they are simply treated differently. Commerce did not err in finding that there is an insufficient tie of these expenses to particular sales to warrant direct expense treatment.

Dole also points out that the Federal Circuit has recently confirmed that pre-sale as well as post-sale movement expenses may be deducted from FMV as a COS adjustment. *Torrington Co. v. United States*, 68 F.3d 1347, 1353-56 (Fed. Cir. 1995). As indicated, limited pre-sales expenses have been found to be direct. *Torrington* did not change this. Commerce is correct that Dole's reliance on *Torrington* is misplaced as the court did not reach the issue of whether Commerce's analytical link between pre-sale movement expenses and pre-sale warehousing expenses is in accordance with law, as it [***59] did in *Ad Hoc Committee*. The court merely approved Commerce's use of the COS standards to determine whether home market pre-sale movement expenses should be deducted in the calculation of FMV. *Id.* at 1356. This does not change the fact that, pursuant to 19 C.F.R. § 353.56(a) (1), Commerce will make a full COS adjustment only if the expenses are determined to be directly related to the sales under investigation. In the light of the foregoing, the court finds that Commerce's determination that Dole's pre-sale third country movement expenses were not directly related to the sales under investigation and were therefore not fully deductible under the COS provision was reasonable and supported by substantial evidence.

Alternatively, Dole argues that if its third country pre-sale movement expenses must be characterized as indirect, then

Commerce erred in refusing to treat similar United States movement expenses as indirect [*1334] for purposes of the ESP offset cap, as well. Commerce, however, while recognizing that there is an "admitted imbalance" in its treatment of Dole's United States movement expenses and its treatment of third country movement expenses, concluded, after examining [***60] the then applicable statutory and regulatory provisions, that it was "without the authority" to correct the imbalance. Final Concur. Mem. at 18. In its final determination, Commerce stated, "we do not have the option of treating comparable expenses on U.S. sales as indirect in nature because such sales are ESP sales, and [19 U.S.C. § 1677a(d)(2)(A)] clearly requires the deduction of such expenses in arriving at USP." [**30] Final Det., 60 Fed. Reg. at 29,564. Section 1677a(d)(2)(A), Title 19, United States Code provides in relevant part:

The purchase price and the exporter's sales price shall be adjusted by being--

* * *

(2) reduced by--

* * *

(A) . . . the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States; . . . .

19 U.S.C. § 1677a(d) (2) (A). The Federal Circuit recently came to the same conclusion, finding that treatment under the agency created ESP offset cap is inappropriate for expenses already subject to specific [***61] statutory adjustment. *Sharp Corp. v. United States*, 63 F.3d at 1097.

Dole claims *Sharp* is not applicable here because (1) it involved home market selling expenses not substitute third-country transport and duty expenses; (2) a court cannot uphold an agency decision on grounds not relied upon by the agency; and (3) *Sharp* did not consider the legislative history of Congress' recent amendment of the antidumping law to expressly provide for the deduction of all movement expenses from FMV. Finally, Dole claims that 19 U.S.C. § 1677a(d) (2) (A) says nothing about the categorization of U.S. pre-sale movement and import duty expenses. Of course, the new statute does not apply and the old statute gives a clear answer. Thus, Dole's arguments are either irrelevant or incorrect on this issue.

The court finds that, in light of the Federal Circuit decision in *Sharp*, Commerce's refusal to include U.S. pre-sale movement expenses in setting the ESP offset cap pursuant to 19 U.S.C. § 1677a(d) (2)(A) was in accordance with law. Accordingly, the court affirms Commerce's decision in this respect.

CONCLUSION

This matter is remanded for Commerce to use a consistent time period [***62] for calculating the weighted average dumping margin for all Dole products, to correct the effective date of the antidumping duty order [*1335] with respect to Dole, to consider Dole's evidence in support of a U.S. dollar inventory cost measure, and to use a non-output price-based methodology to allocate joint costs between solid and non-solid outputs. Remand results should be returned within 60 days. Any new objections may be filed within 11 days thereof. Any responses are due within 11 days thereafter.

Jane A. Restani, JUDGE

Dated: New York, New York

This 8th day of November, 1996.

**Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit From Thailand**

**Agency:** Import Administration, International Trade Administration, Department of Commerce.

**Effective Date: June 5, 1995**
**FOR FURTHER INFORMATION CONTACT:**
Michelle Frederick or Jennifer Katt, Office of Antidumping Investigations Import Administration, International Trade Administration, U.S. Department Of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482-0186 or 482-0498, respectively

**Final Determination**

We determine that imports of canned pineapple fruit (CPF) from Thailand are being, or are likely to be, sold in the United States at less than fair value, as provided in section 735 of the Tariff Act of 1930, as amended (the "Act") (1994). The estimated weighted-average margins are shown in the Continuation of Suspension of Liquidation" section this notice

*Case History*

Since are affirmative preliminary determination and postponement of the final determination on January 4, 1995 (60 FR 2734, January 11, 1995) *(Preliminary Determination)*, the following events have occurred:

On January 20, 1995, Maui Pineapple Company, Ltd. and the International Longshoremen's and Warehousemen's Union (the petitioners) alleged a ministerial error in the Department's preliminary determination calculations regarding

Dole Food Company, Inc. Dole Packaged Foods Company, and Dole Thailand, Ltd. (collectively Dole). The error was found to constitute a significant ministerial error because the correction resulted in a difference between a dumping margin of *de minimis* and a margin greater than *de minimis*. *See* § 353.15(g)(4)(ii) of the Department's Proposed Regulations (57 FR 1131, January 10, 1992). An amended preliminary determination was issued on February 22, 1995).

The four respondents in this investigation, Dole, The Thai Pineapple Public Co., Ltd. (TIPCO), Siam Agro Industry Pineapple and Others Co., Ltd. (SAICO), and Malee Sampran Factory Public Co., Ltd. (Malee), submitted revisions to their responses, and/or revised computer tapes that corrected clerical errors discovered at verification in January, February, March and April 1995.

We conducted verifications of TIPCO, SAICO and Malee's sales and cost questionnaire responses in Thailand in February and March 1995. Verifications of Dole's sales and cost responses were conducted in Belgium, Thailand, Hong Kong, and the United States in January , February and March 1995.

Dole, TIPCO, SAICO, Malee and the petitioners submitted case briefs on April 26, 1995, and rebuttal briefs on May 3, 1995. At the request of both the petitioners and Dole, a public hearing was held on May 10, 1995.

*Scope of the Investigation*

The product covered by this investigation is canned pineapple fruit (CPF). For the purposes of this investigation, CPF is defined as pineapple processed and/or prepared into various product forms, including rings, pieces, chunks, tidbits, and crushed pineapple, that is packed and cooked in metal cans with either pineapple juice or sugar syrup added. CPF is currently classifiable under subheadings 2008.20.0010 and

2008.20.0090 of the *Harmonized Tariff Schedule of the United States* (HTSUS) HTSUS 2008.20.0010 covers CPF packed in a sugar-based syrup; HTSUS 2008.20.0090 covers CPF packed without added sugar (i.e.) juiced-packed). Although the HUSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this proceeding is dispositive.

*Period of Investigation*

The period of investigation ("POI") is January 1 through June 30, 1994, for TIPCO, SAICO and Malee; and January 2 through June 18, 1994, for Dole (see Memorandum from Gary Taverman to Barbara R. Stafford, dated August 18, 1994).

*Applicable Statute and Regulations*

Unless otherwise indicated, all citations to the statute and to the Department's regulations are in reference to the provisions as they existed on December 31, 1994.

*Such or Similar Comparisons*

We have determined that all products covered by this investigation constitute a single category of such or similar merchandise. Where there were no sale of identical merchandise in the third country market [1] -to compare to U.S. sales, we made similar merchandise comparisons on the basis of the criteria defined in Appendix V to the antidumping questionnaire, on file in Room B-099 of the main building of the Department of Commerce. In accordance with 19 CFR 353.58, we made comparisons at the same level of trade, where possible. Where we were not able to match sales at the same level of trade, we made comparisons across levels of trade.

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[1] Third country markets were used because none of the four respondents had a viable home market.

Based on the functional differences between Dole's U.S. and German customers, we continued to consider Dole's sales of CPF to be made at two distinct levels of trade in both the U.S. and German markets. *(See Preliminary Determination* and Import Administration Policy Bulletin 92/1, dated July 29, 1992.) The first level is comprised of sales to customers in the retain and food service sectors (Level I); the second is comprised of sales to customers in the industrial sector (Level II).

*Fair Value Company*

To determine whether sales of CPF from Thailand to the United States were made at less than fair value, we compared the United States price (USP) to the foreign market value (FMV), as specified in the "United States Price" and "Foreign Market Value" sections of this notice.

As stated in our preliminary determination, Dole has reported all of its U.S. sales of subject merchandise, including those of Philippine origin and re-sales of CPF Dole purchased from unrelated producers in Thailand. We have continued to exclude these sales by weighing the dumping margin for each Universal Product Code (UPC) category by both (1) the ratio of shipments of CPF from Thailand to the total volume shipped from both Thailand and the Philippines during the last seven accounting periods of 1993, and (2) the ratio of shipments of Dole-produced products to the total volume of Dole-produced and purchased product shipped to the United States during 1993, respectively. For further discussion, see the *Preliminary Determination* and Comment 8 in the "Interested Party Comments" section of this notice.

For those unreported U.S. sales by TIPCO, SAICO and Malee presented or discovered during verification, we are applying the average of all positive margins to the quantities sold as best information available (BIA). *See* Comment 2 below.

*United States Price*

For Dole, TIPCO, SAICO and Malee we calculated USP according to the methodology described in our preliminary determination, with the following company-specific exceptions:

*A. Dole*

1. We excluded all sales made to military commissaries from our calculation of USP because we determined that these sales do not represent the sale to the first unrelated purchaser. In this channel of trade, the first unrelated purchaser of CPF is a distributor for the U.S. military. This distributor takes title and physical possession of the merchandise before reselling it to military commissaries. Dole's sales to the distributor were included in our calculation of USP.

2. In the *Preliminary Determination* we stated that Dole would be required to report as U.S. sales, certain shipments pursuant to a long-term agreement negotiated prior to the POI. Because these shipments were not reported for the preliminary determination, we applied as BIA, the average of all positive margins to one-half of the maximum quantity specified in the agreement to be purchased during 1994. Based on our findings at verification, we determined that Dole made no shipments pursuant to the contract during the POI. Therefore, Dole did not fail to report these sales and we have removed these sales from our margin calculation.

3. We recalculated direct selling expenses for the "warehouse club" channel of trade to reflect he allowance confirmed at verification.

4. We recalculated inventory carrying costs using a publicly available representative Thai baht borrowing rate for that period of time the merchandise was held in inventory in Thailand. For the period of time when the merchandise was

shipped to and held in inventory in the United States, we used the short-term U.S. dollar borrowing rate confirmed at verification, because the title passed from the Thai producer to the U.S. parent at the time of shipment. For further discussion, see the Concurrence Memorandum, dated May 26, 1995, on file in Room B-099 of the main Commerce building (Concurrence Memorandum).

*B. TIPCO*

1. We reclassified reported rebates as discounts because it was determined that customers paid a reduced price, rather than receiving a refund of monies. *See* Comment 21 below.

2. We reclassified a certain expense reported as warranty expense as a discount. It was determined that a customer did not receive a reimbursement for the reported warranty claim, but rather paid a reduced price. *See* Comment 21 below.

3. We recalculated inventory carrying costs based on the actual cost of manufacture of the inventory, rather than the selling price. In addition, we applied TIPCO's borrowing rate for short-term loans during the POI denominated in bhat.

*C. SAICO*

1. We did not reduce USP for export bill discounts because we determined that this expense was already captured in our imputed credit calculation. *See* Comment 29 below.

2. As in the preliminary determination, we included certain U.S. shipments of spoiled subject merchandise because we determined them to be POI sales. *See* Comment 28 below.

*D. Malee*

1. We recalculated inventory carrying costs based on the actual cost of manufacture of the inventory, rather than the selling price. In addition, we applied Malee's borrowing rate for short-term loans during the POI denominated in baht.

*Foreign Market Value*

As stated in our preliminary determination, we determined that the home market was not viable for any of the four respondents. In accordance with 19 CFR 353.49(b), we selected Germany as the third country market for all four respondents. We calculated FMV as noted in the "Price-to-Price" and "Price to Constructed Value (CV)" sections of this notice.

*Cost of Production*

Based on the petitioners' allegations, the Department found reasonable grounds to believe or suspect that sales in the comparison market were made as prices below the cost of producing the merchandise. As a result, the Department initiated investigations to determine whether Dole, TIPCO, SAICO and Malee made third country sales during the POI at prices below their respective cost of productions (COP) within the meaning of section 773(b) of the Act. See memorandum from Richer W. Moreland to Barbara K Stafford, dated October 21, 1994.

*A. Calculation of COP*

We calculated the COP based on the sum of each respondent's cost of materials, fabrication. general expenses and third country packing in accordance with 19 CFR 353.51(c). We relied on the submitted COPs, except in the following company specific instances where the costs were not appropriately quantified or valued:

*Dole*

1. We rejected the respondent's submitted fruit cost allocation methodology and recalculated these costs as described in Comment 7 below.

2. We increased fruit costs to include purchases of pineapple fruit on the last day of the POI, which had been excluded from the submitted fruit cost calculation.

3. We adjusted certain costs incurred prior to the split-off point which were improperly allocated. See Comment 7 below.

4. We increased fixed overhead costs to remove a credit which was specifically related to non-subject merchandise.

5. We recalculated other materials costs to reflect the actual packing medium which was used in each product. See Comment 17 below.

6. We adjusted fixed overhead and other materials costs for the respondent's incorrect calculation of the activity base used for these costs.

7. We recalculated general and administrative (G&A) expenses using the respondent's 1993 audited financial information. See Comment 18 below.

8. For those products where more than one COP value was reported, we calculated an average COP value for the product.

TIPCO

1. We rejected the respondent's submitted fruit cost allocation methodology and recalculated these costs. *See* Comment 7 below.

2. We adjusted certain costs incurred prior to the split-off point which were improperly allocated. *See* Comment 7 below.

3. We recalculated TIPCO's G&A expense factor using the company's annual 1993 audited income statement. *See* Comment 22 below. As part of our calculation, we reduced 1993 G&A costs and increased cost of sales to account for the administrative costs reported as part of cost of manufacture in 1994. The 1993 selling expenses and reclassified administrative costs were approximated using information on the record.

4. We adjusted interest expense to reflect the adjustment to costs of sales discussed above.

5. For those products where more than one COP value was reported, we calculated an average COP value for the product.

*SAICO*

1. We recalculated SAICO's cost of pineapple fruit in the following manner: (a) We calculated SAICO's pineapple cost using the company's normal cost accounting methodology (see Comment 7 below); (b) we recalculated SAICO's plantation growing costs using the company's normal costing methodology with a modification for the allocation of overhead costs between subject and non-subject crops based on direct labor hours; and (c) we recalculated the cost of juice used as a packing medium.

2. We adjusted certain costs incurred prior to the split-off point which were improperly allocated. *See* Comment 7 below.

3. We recalculated SAICO's fixed overhead expense based on the amortization of 1993 shutdown costs over the POI.

4. We recalculated SAICO's G&A rate to account for the omission of board of director fees.

*Malee*

1. We rejected the respondent's submitted fruit cost allocation methodology and recalculated these costs as described in Comment 7, below.

2. We adjusted fruit cost for the respondent's incorrect calculation of conversion factors.

3. We adjusted certain costs incurred prior to the split-off point which were improperly allocated. *See* Comment 7 below.

4. We increased overhead by including the depreciation effect of foreign exchange losses incurred on purchases of machinery and removing a credit for a reimbursement.

5. We increased G&A expenses to include the G&A expenses of Malee's parent company, which is a holding company with no operations, and inventory write-downs.

6. We adjusted certain COP offsets to reflect amounts which are more directly related to production during the POI. (*See* the Concurrence Memorandum for a further discussion of all of these adjustments.)

7. For those products where more than one COP value was reported, we calculated an average COP value for the product.

*B. Test of Third Country Sales Prices*

After calculating COP, we tested whether, as required by section 773(b) of the Act, each respondent's third country sales of subject merchandise were made at prices below COP, over an extended period of time in substantial quantities, and whether such sales were made at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade. On a product specific basis, we compared the COP (net of selling expenses) to the reported third country

prices, less any applicable movement charges, rebates, and direct and indirect selling expenses. To satisfy the requirement of section 773(b)(1) of the Act that below-cost sales be disregarded only if made in substantial quantities, we applied the following methodology. If over 90 percent of a respondent's sales of a given product were at prices equal to or greater than the COP, we did not disregard any below-cost sales of that product because we determined that the below-cost sales were not made in "substantial quantities." If between ten and 90 percent of a respondent's sales of a given product were at prices equal to or greater than the COP, we discarded only the below-cost sales, provided sales of that product were also found to be made over an extended period of time. Where we found that more than 90 percent of a respondent's sales of a product were at prices below the COP, and the sales were made over an extended period of time, we disregarded all sales of that product, and calculated FMV based on CV, in accordance with section 773(b) of the Act.

In accordance with section 773(b)(1) of the Act, in order to determine whether below-cost sales had been made over an extended period of time, we compared the number of months in which below-cost sales occurred for each product to the number of months in the POI in which that product was sold. If a product was sold in three or more months of the POI, we do not exclude below-cost sales unless there were below-cost sales in at least three months during the POI. When we found that sales of a product only occurred in one or two months, the number of months in which the sales occurred constituted the extended period of time *i.e.*, where sales of a product were made in only two months, the extended period of time was two months; where sales of a product were made in only one month, the extended period of time was one month. *See Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings from the United Kingdom*, 60 FR 10558, 10560 (February 27, 1995).

C. *Results of COP Test*

We found that for certain types of CPI more than 90 percent of each respondent's third county sales were sold at below COP prices over an extended period of time. Because neither Dole, TIPCO, SAICO nor Malee provided any indication that the disregarded sales were at prices that would permit recovery of all costs within a reasonable period of time in the normal course of trade, for all U.S. sales left without a match to third country sales as a result of our applications of the COP test we based FMV on CV, in accordance with section 773(b) of the Act.

*D. Calculation of CV*

In accordance with section 773(e)(1) of the Act, we calculated CV based on the sum of a respondent's cost of materials, fabrication, general expenses and U.S. packing costs as reported in the U.S. Sales database. In accordance with section 773(e)(1)(B)(i) and (ii) of the Act we included: (1) For general expenses, the greater of a respondent's reported general expenses, adjusted as detailed in the "Calculation of COP" section above, or the statutory minimum of ten percent of the cost of manufacture; and (2) for profit, the statutory minimum of eight percent of the sum of COM and general expenses because actual profit on third country sales for each respondent was less than eight percent. We recalculated each respondent's CV based on the methodology described in the calculation of COP above. In addition, for Malee, we recalculated interest expense using the company's 1993 consolidated financial statements.

*Price-to-Price Comparisons*

For those products for which there were an adequate number of sales at prices above the COP, we based FM on third country prices. We calculated FMV according to the methodology described in our preliminary determination, with the following company-specific exceptions:

*Dole*

1. We excluded a single, small volume sale from the calculation of FMV because we determined this sale was outside the ordinary course of trade. *See* Comment 9 below.

2. We excluded certain sales from our calculation of FMV where Dole knew at the time of same that he merchandise would be delivered to an ultimate location outside of Germany. For further discussion, see the Concurrence Memorandum.

3. We recalculated credit incurred on sales denominated in deutsche marks using a publicly available representative equivalent of the German prime rate for the POI as the short-term borrowing rate.

4. We recalculated inventory carrying costs using a publicly available representative baht borrowing rate for that period of time the merchandise was held in inventory in Thailand. For that period of time when the merchandise was shipped to and held in inventory in Europe, we used the short-term borrowing rate confirmed at verification. For further discussion, see the Concurrence Memorandum.

5. We used the date of the final determination for all missing payment dates in our calculation of imputed credit.

6. We corrected a clerical error regarding the calculation of pre-sale movement expenses. In addition, we reclassified all movement, import duty, and warehousing expenses associated with certain sales made prior to importation as post-sale expenses. *See* Comment 12 below.

*TIPCO*

1. We recalculated credit expenses using the interest rate applicable to the currency in which the sale was incurred. For sales denominated in U.S. dollars, the U.S.

interest rate was based on TIPCO's dollar denominated short-term loans during the POI. For sales denominated in deutsche marks, we based the interest rate on a publicly available representative German short-term borrowing rate in effect during the POI.

2. We recalculated inventory carrying costs based on the actual cost of manufacture of the inventory, rather than the selling price. In addition, we applied TIPCO's actual baht denominated short-term borrowing rate for the POI.

*SAICO*

1. We recalculated credit expenses using the interest rate applicable to the currency in which the sale was incurred. Because SAICO had no dollar denominated short-term borrowings during the POI, the U.S. interest rate was based on the average prime rate charged by the 25 largest U.S. banks on short-term business loans for the period January through June 1994.

2. We included one third country sale presented at the start of verification in our calculation of FMV because the quantity involved was insignificant and all the charges and adjustments associated with this sale were verified.

3. We excluded certain sales from our calculation of FMV where SAICO knew at the time of sale that the merchandise would be delivered to an ultimate location outside of Germany. For further discussion, see the Concurrence Memorandum.

*Malee*

1. We recalculated credit expenses using the interest rate applicable to the currency in which the sale was incurred. Because all sales to the United States and Germany were made in U.S. dollars, the U.S. interest-rate was based on

Melee's actual weighted-average U.S. dollar denominated short-term borrowing rate in effect during the POL

2. We recalculated inventory carrying costs based on the actual cost of manufacture of the inventory, rather than the selling price. We applied Melee's actual baht denominated short term borrowing rate for the POI.

*Price-to-CV Comparisons*

Where, for TIPCO, SAICO and Malee, we made CV to purchase price comparisons, we deducted from CV the weighted-average third country direct selling expenses and added the U.S. product specific direct selling expenses. We adjusted for differences in commissions in accordance with 19 CFR 353.56(a)(2) as follows.

Where, for TIPCO, SAICO and Malee, we made CV to purchase price comparisons, we deducted from CV the weighted-average third country direct selling expenses and added the U.S. product specific direct selling expenses. We adjusted for differences in commissions in accordance with 19 CFR 353.56(a)(2) as follows:

Where commissions were paid on some third country sales, we deducted from CV both (1) indirect selling expenses attributable to those sales on which commissions were not paid; and (2) commissions. The total deduction was capped by the amount of the commission paid on the U.S. sales in accordance with 19 CFR 353.56(b)(1) (1994). Where no commissions were paid on third country sales, in accordance with 19 CFR 353.56(b)(1), we deducted the lesser of either (1) the amount of the commission paid on the U.S. sale; or (2) the sum of the weighted average indirect selling expenses paid on the third country sales. Finally, the amount of the commission paid on the U.S. sale was added to FMV in accordance with 19 CFR 353.56(a)(2).

Where we compared Dole's ESP transactions to CV, we made deduction for the weighted-average third country direct selling expenses. We also deducted from CV the weighted-average third country indirect selling expenses. This deduction was capped by the amount of U.S. indirect selling expenses, in accordance with 19 CFR 353.56(b)(1) and (2).

*Currency Conversion*

We made currency conversions based on the official exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank of New York, pursuant to 19 CFR 353.60.

*Verification*

As provided in section 776(b) of the Act, we verified information provided by Dole, TIPCO, SAICO and Malee by using standard verification procedures including the examination of relevant sales and financial records, and selection of original source documentation containing relevant information.

*Interested Party Comments*
*General Issues*
*Comment 1*

TIPCO, SAICO and Malee argue that if inadequate above-cost sales of a give comparison market model are found as a result of the COP test, the Department should look for another similar model with adequate above-cost sales rather than go directly to CV. Although TIPCO, SAICO and Malee recognize that their arguments are at odds with the Department's Policy Bulletin 92/4, the argue that the Department's policy is flawed and should be changed for this final determination. TIPCO, SAICO and Malee assert that although the statutory definition of "such or similar merchandise" contained in section 771(16) of the Act does not

include adequate sales above cost as a criterion of similar merchandise, it does not preclude the Department from making product matches with regard to cost considerations.

In addition, TIPCO, SAICO and Malee contend that, pursuant to *Koyo Seiko Co. v. United States*, 810 F. Supp. 1287, 1290 (CIT 1993), *rev'd on other grounds*, 36 F.3d 1565 (Fed. Cir. 1994), the Department must consider all potential model matches and avoid the use of CV whenever possible. Further, the respondents claim that considering COP in the matching procedure would not be burdensome to the Department because the only additional work would be in switching lines of computer code so that the product matching concordance is applied after, rather than before, the below-cost sales test. Finally, TIPCO, SAICO and Malee argue that the statute strongly favors the use of price-to-price comparisons whenever possible. Therefore, these respondents contend that the Department should base FMV on comparison market prices as long as there are above-cost sales of similar merchandise.

The petitioners argue that the Department's policy with respect to this issue is clear. Specifically, the Department has consistently determined that the statute does not require the exhaustion of all possible model matches before resorting to CV. Furthermore, they argue that the Department has been given broad discretion in making product matching decisions. Finally, the petitioners note that the Department's practice with respect to this issue has been upheld by the Court of International trade (CIT). *See Zenith Electronics Corp. v. the United States*, 872 F. Supp. 992 (CIT 1994) (*Zenith*).

*DOC Position*

We agree with the petitioners. The Department's practice is to proceed directly to constructed value if the most similar match fails the cost test. Although section 7739a) of the Act expresses a preference for using the price of such or similar merchandise as the FMV before resorting to CV if,

after disregarding sales below cost, the remaining sales are inadequate as the basis for FMB. *See, e.g., Final Determination of sales at Less Than Fair Value: Stainless Steel Angle from Japan*, 60 FR 16608, 16616 (March 31, 1995), and *Antifriction Bearings (Other Than Tapered Roller Bearings) and parts Thereof from France, et al.; Final Results of Antidumping Duty Administrative Review, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*, 60 FR 10900, 10936 (February 28, 1995). Furthermore, the Department's practice on this issue was upheld in *Zenith* where the CIT rejected the argument, similarly made here by the respondents, that if any merchandise meeting one of the definitions of "such or similar" under section 771(16) of the Act survives the cost test, such merchandise would be used for price comparison purposes. *See Zenith*, 872 F. Supp. at 999. As the Court stated, once the product matches are established and the COP test is completed, the Department is not required to reexamine all of the undifferentiated product data in order to make new matches and price comparisons on the basis of whatever subset of lower-ranked such or similar merchandise survives the COP test. The respondents' reliance on *Koyo Seiko* therefore is misplaced. In that case the Court rejected the Department's resorting to CV when initial attempts at most similar model matches failed; the case did not involve resorting to CV due to failure to pass the COP test. *See Zenith*, 872 F. Supp. at 999 n.8.

In this proceeding, therefore, the Department properly used CV for those product match comparisons that failed the COP analysis.

*Comment 2*

The petitioners contend that the Department should include in its calculation of USP the unreported U.S. sales to Puerto Rico made by TIPCO, SAICO and Malee that ere presented at or discovered during verification. To derive the expenses associated with these sales, the petitioners argue that the Department should reduce the per unit value for each

unreported sale by the highest charges and adjustments reported by each company in the U.S. sales listing. The petitioners contend that the highest deductions are appropriate because shipments to Puerto Rico pass through the Panama Canal thus incurring additional expenses. In addition, for TIPCO the petitioners contend that an additional deduction for certain expenses noted on the invoice is appropriate.

TIPCO, SAICO, and Malee argue that the Department should exclude the unreported Puerto Rican sales from the calculation of USP because these sales account for only an insignificant portion of total U.S. sales during the POI. In the event the Department determines inclusion of these sales is appropriate, TIPCO, SAICO and Malee argue that applying the highest deductions is unwarranted. Malee asserts that the movement and selling expenses it reported for sales to Puerto Rico in its February 2, 1995, submission should be used as the best estimate of charges and expenses for the omitted sales. SAICO argues that Puerto Rican sales incur exactly the same average expenses as other U.S. sales with the same sales terms, thus the average charges and adjustments reported for U.S. sales with the same sales terms should be applied.

*DOC Position*

We agree with the petitioners that these Puerto Rican sales should be included in the calculation of USP because Puerto Rico is part of the Customs territory of the United States. However, we disagree with the petitioners that it is appropriate to apply the highest deductions to these sales. Based on our findings at verifications, we conclude that the omission of these sales was inadvertent. Thus, we are applying the average of all positive margins for each company to each of the unreported Puerto Rican sales as BIA.

*Comment 3*

TIPCO, SAICO and Malee argue that the Department should calculate imputed credit costs using a weighted average short-term borrowing rate which reflects the currency in which the sale was invoiced. The respondents note that this methodology is consistent with the Department's policy expressed in the *Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings from Thailand*, 60 FR 10552 (February 27, 1995). Malee asserts that the Department should use either the dollar denominated short-term borrowing rate calculated at verification or apply a U.S. dollar short-term interest rate obtained from public information.

TIPCO argues that dollar denominated short-term borrowing rate presented in its case brief should be used to calculate the imputed credit expense for all U.S. dollar and deutsche mark denominated sales. SAICO had no dollar denominated short-term borrowings during the POI.

*DOC Position*

We agree with TIPCO and Malee, in part. We have applied the actual weighted-average dollar denominated short-term borrowing rates calculated for Malee and TIPCO to all U.S. and German sales invoiced in U.S. dollars. Because SAICO had no dollar denominated borrowings during the POI, we are applying, as a publicly available representative U.S. dollar short-term interest rate, the average prime rate charged by the 25 largest U.S. banks on short-term business loans for the period January through June 1994.

We disagree with TIPCO, however, that it is appropriate to apply a dollar rate to those German sales invoiced in deutsche marks. Because these German sales are deutsche mark-denominated transactions, it is appropriate to apply a deutsche mark-denominated short-term borrowing rate

to determine the credit costs associated with these transactions. Because TIPCO had no deutsche mark-denominated borrowings during the POI, we have applied a publicly available representative German short-term borrowing rate for the POI.

*Comment 4*

SAICO, Malee, and the petitioners request that a number of corrections presented at, and found during, the sales verifications should be incorporated into the Department's calculations of the final margins.

*DOC Position*

All corrections listed in the respondents' and the petitioners' case briefs with respect to the sales were confirmed on-site at verification and were incorporated in the Department's calculation of the final margin.

*Comment 5*

TIPCO, SAICO, and Malee argue that a particular proprietary payment should be allowed as an adjustment to COP and CV. Alternatively, if the Department chooses to disallow these payments for purposes of computing costs, the three respondents claim that the payments should be treated as sales price adjustments.

The petitioners believe that no adjustment should be made for the payments because the Department did not verify that these payments were related in any way to the production of CPF.

*DOC Position*

Because of the business proprietary nature of this item, we have addressed the parties' comments and analyzed the issue in detail in the proprietary concurrence memorandum.

Our determination was to allow the payments as an offset to the respondents' submitted COP and CV figures.

*Comment 6*

Each of the four respondents claims that providing accurate cost information is not the main purpose of its normal fruit cost allocation methodology; rather each company's allocation methodology was devised to achieve certain managerial goals. The respondents argue that their normal allocation methodologies therefore result in the misallocation of fresh pineapple fruit costs and generate cost figures that bear no relationship to the actual costs incurred.

Consequently, each respondent submitted alternative fruit cost methodologies, based on the relative weight of fresh pineapple fruit in CPF and juice products, that result in a lower fruit cost being allocated to CPF. Accordingly to the respondents, use of a weight-based fruit cost allocation methodology is appropriate in the context of this antidumping proceeding because it is based on a non-distortive, neutral, physical criterion, *i.e.*, weight. Dole also argues that is submitted methodology s consistent with its treatment of other shared operating and overhead costs, which are allocated among products on the basis of weight. Furthermore, the respondents argue that use of a weight-based methodology is appropriate because the petitioners use such a methodology for tax purposes, elevating the practice to an acknowledged and accepted industry norm.

In addition to arguing that their normal fruit cost allocation methodologies are inappropriate, the respondents argue that use of a value-based methodology also would be inappropriate. One respondent, in particular, argues that although its normal allocation methodology is based on an estimate of relative sales value, such a methodology is inappropriate under general accounting principles. According to the respondents, Cost Accounting: A Managerial Emphasis

(Horngren and Foster 1987) (*Cost Accounting*) indicates that use of value-based allocations is discourages in a rate-regulated setting because "it is circular reasoning to use selling prices as a basis for determining a selling price." The respondents argue that if the Department uses its normal value-based allocation of pineapple fruit costs, dumping margins would fluctuate because of changes in juice and concentrate prices.

All four respondents argue that a value-based allocation is also legally impermissible under the precedent established in *IPSCO v. United States*, 965 F.2d 1056 (Fed. Cir. 1992). The respondents contend that in *IPSCO* the Court of Appeals for the Federal Circuit held that value-based allocations inappropriately shift cost actually incurred with respect to one co-product onto another co-product. Furthermore, Dole and Malee suggest that a value-based allocation, which would result in values being assigned to the various parts of the pineapple (*i.e.*, the shell, the core, the ends, and the cylinder), is inappropriate because they themselves do not assign values to the various part of the fruit and because pineapples are purchased in their entirety on a per kilogram basis.

Finally, the respondents argue that a value-based methodology would provide a loophole for companies to manipulate dumping margins. According to the respondents, a company could reduce CPF prices in non-comparison markets or in the U.S. market, or could increase prices of non-subject merchandise, any of which actions would reduce the relative sales value of the subject merchandise, thereby resulting in a reduction of allocated costs. A reduction in allocate costs, according to respondents, would result in some comparison market models surviving a below-cost sales test or in a reduction of constructed value when comparison market models remain below cost.

The petitioners argue that Department precedent supports the use of the respondents' normal cost allocation methodologies for calculating COP and CV. See, *e.g.*, *final*

*Determination of Sales at Less Than Fair Value Certain Hot-Rolled Carbon Steel Flat Products and Certain Cut-To-Length Carbon Set Plate from Korea*, 48 FR 37176 (July 9, 1993) (Department adjusted the submitted data to reflect information calculated under the respondent's normal accounting system). The petitioners contend that respondents' normal allocation methodologies have been accepted by the companies' auditors as reasonable and, in turn, has been used to produce audited financial statements which are relied upon by lenders, shareholders, and Thai tax authorities. Accordingly, the petitioner argue, the respondents' normal allocation methodologies must have some factual basis to them or they would not be accepted by these parties.

With respect to the one respondent's argument that general accounting principles discourage the use of value-based cost allocations in regulatory pricing situations, the petitioners vote that the reference to other Horngren and Foster text is misplaced in this investigation because the CPF industry is not regulated, sales value allocations might be distortive because prices would not be set by the marketplace.

In addition, the petitioners argue that the Department should not consider the respondents' weight-based allocation methodology as an acceptable alternative to their normal fruit cost allocation methodologies. In previous cases, petitioners note, the Department has recognized that weight-based allocations may be inappropriate. See , e.g., *Final Determination of Sales at Less Than Fair Value: Certain Carbon and Alloy Steel Wire Rod from Canada*, 59 FR 18791, 19795 (April 20, 1995) Department determined that weight was result in the same cost per ton regardless of the grade of steel"). Furthermore, the petitioners note that none of the respondents use the submitted weight-based methodology in their normal course of business, nor do they use it for any internal decision-making. The petitioners claim that if the submitted allocation was accurate, the respondents would certainly maintain internal reports showing such a weight-based allocation, yet they do

not. In addition, the petitioners state that they are not aware of any CPF producer anywhere that allocates fruit costs based on weight in its normal accounting system. (The petitioners acknowledge using weight as the basis for calculating fruit costs for tax purposes, but note that their financial and cost amounting systems use value-based allocations. The petitioners argue that, contrary to the respondents' claim, the use of a weight-based allocation for tax purposes does not establish it as an industry standard practice.)

Additionally, the petitioners claim that a weight-based allocation does not make sense in situations such as this one where the respondents' production processes assign values to various parts of the pineapple, depending upon the product being produced, i.e., CPF or juice products. As a result, it makes no sense to use a volume-based allocation ratio to calculate costs of production for products that are produced using a value-based production process.

The petitioners argue, therefore, that a value-based allocation is appropriate for use in the instant investigation where the raw material has different parts with very different values. The petitioners cite *Cost Accounting* at 534 (Horngren, 5th ed. 1980) for the proposition that "[t]he majority of accountants* * * support allocation in proportion to some measure of the relative revenue-generating power identifiable with the individual products." Furthermore, the petitioners argue that IPSCO is not controlling in the instant proceeding because the facts in IPSCO are significantly different from the facts in this investigation.

Finally, the petitioners maintain that the potential dumping consequences suggested. by the respondents are illogical. No company would decreases prices of subject merchandise in non. subject countries in order to affect the dumping margins in the United States because this would reduce profits in those countries. Neither would a company reduce U.S. prices in an attempt to reduce dumping margins

because they would risk increasing them margins. The petitioners argue that the respondents would not increase concentrate prices, to allocate fruit costs away from subject merchandise because this would adversely affect their market share.

*DOC Position*

The legislative history of the COP statute states that "in determining whether merchandise has been sold at less than cost (the Department) will employ accounting principles generally accepted in the home market of the country of exportation if (the Department) is satisfied that such principles reasonably reflect the variable and fixed costs of producing the merchandise "H.R. Rep. No.571, 93d Cong., 1st Sess. 71 (1973). Accordingly, the Department's practice is to adhere to an individual firm's' recording of costs in accordance with GAAP of its home country if the Department is satisfied that such principles reasonably reflect the costs of producing the subject merchandise. *See*, e.g., *Final Determination of Sales at less Than Fair Value: Furfuryl Alcohol from South Africa*, 60 FR 22556 (May 8, 1995) ("The Department normally relies on the respondent's books and records prepared in accordance with the home country GAAP unless these accounting principles do not reasonably reflect the COP of the merchandise"). The Department's practice has been sustained by the CIT. See, e.g. *Laclede Steel Co. v. United States*, Slip Op. 94-160 at 21-25 (CIT October 12, 1994) (CIT upheld the Department's decision to reject the respondent's reported depreciation expenses in favor of verified information obtained directly from the company's financial statements that was consistent with Korean GAAP.

Normal accounting practices provide an objective standard by which to measure costs, while allowing the respondents a predictable basis on which to compute those costs. However, in those instances where it is determined that a company's normal accounting practices result in an unreasonable allocation of production costs, the Department

will make certain adjustments or may use alternative methodologies that more accurately capture the costs incurred. *See, e.g., Final Determination of Sales at lass Than Fair Value: New Minivans from Japan*, 57 FR 21937. 21952 (May 26, 1992) (Department adjusted a company's U.S. further manufacturing costs because the company's normal accounting methodology did not result in an accurate measure of production costs).

In the instant proceeding, the respondents want the Department to reject their normal allocation methodologies in favor of alternative methodologies reported during the investigation. As noted, however, the Department's practice is to rely on a respondent's books and records prepared in accordance with its home country GAAP unless these accounting principles do not reasonably reflect costs associated with production of the subject merchandise. As a result, before analyzing any alternative allocations or accounting methodologies reported by a respondent during the proceeding, the Department will determine whether it is appropriate to use the respondent's normal allocation methodologies.

In the instant proceeding. therefore, the Department examined whether each respondent's normal fruit cost allocation methodology was reasonable. In examining each respondent's books and records at verification we found that each company had used its recorded fruit cost allocation methodology for at least a number of years. Furthermore, we found no evidence that each respondent had not relied historically upon its recorded allocation percentages to compute its production costs. In addition, evidence on the record, i.e., audited financial statements, indicates that each respondent's normal allocation methodology was accepted by its independent auditors. Given the auditors' acceptance of the respondent's financial statements and any lack of evidence to the contrary, we conclude that each respondent's normal allocation methodology is consistent with generally accepted accounting principles practiced in Thailand.

Given the fact that each respondents' allocation methodology is consistent with Thai GAAP, we will accept each respondent's normal allocation methodology unless the methodology results in allocations that do not reasonably reflect the costs associated with production of CPF. The respondents have argued that their normal allocation methodologies do not reasonably reflect costs because the methodologies, were designed to achieve certain managerial goals as opposed to providing accurate cost information.

While the reasons cited by the respondents for employing the allocation methodologies may have been factors in their selection. this does not necessarily make such methodologies, or the resulting allocations, unreasonable.

In *Hercules, Inc. v. United States*, 673 F. Supp. 454 (CIT 1987), for example, the Court upheld the Department's decision to rely on COP -information from respondent's normal financial statements maintained in conformity with GAAP. The respondent, SNPE, had argued that the accelerated depreciation method employed in its financial statements and records was for tax purposes and did not accurately reflect SNPE's actual costs. Consequently, SNPE submitted recalculated depreciation expenses under a straight-line methodology. The Department rejected SNPE's alternate allocation methodology, which was based on unverifiable allegations that straight-line depreciation methodology would more accurately reflect the actual costs, in favor of the information contained in SNPE's verified normal records and audited financial statements. *See Hercules*, 673 F. Supp. at 490-91.

In the instant investigation, the respondents' arguments that their normal allocation methodologies are based on certain managerial goals and therefore do not accurately. reflect actual costs are similarly unpersuasive. An accounting methodology designed to achieve certain managerial goals does not necessarily imply that the employed methodologies result in an

unreasonable reflection of costs, particularly where a company's accounting methodology had been approved by independent auditors. In addition, as discussed in the paragraphs below concerning the respondents' alternative allocation methodologies, the respondents have failed to demonstrate that their unverifiable alternative methodologies are a more reliable source of reasonable fruit cost allocations than their verified books and audited financial records.

Based on the foregoing, we have adjusted Malee's. SAICO's and TIPCO's submitted fruit costs to reflect the allocations as calculated and verified under each company's normal accounting system. Their normal allocation methodologies are consistent with Thai GAAP and appear to reasonably allocate fruit costs to CPF. Furthermore, the respondents have provided insufficient. if any, evidence to the contrary. In addition, as discussed below, the respondents have failed to demonstrate that their unverifiable allocations than their verified books and audited financial records.

Notwithstanding the Department's conclusion that the respondents' normal fruit cost allocation methodologies are in accordance with Thai GAAP and the Department's rejection of the respondents' arguments concerning the managerial goals of their normal allocation methodologies, the . Department determines that in light of the practices followed by the other three respondents in this investigation, Dole's normal allocation methodology results in an unreasonable allocation of fruit costs to CPF. Due to the proprietary nature of the facts at issue, our entire analysis of Dole's normal allocation methodology is contained in the proprietary version of our concurrence memorandum dated May 26, 1995.

Thus, we have determined that because Dole's allocation does not "reasonably reflect" the cost of producing the merchandise, we cannot employ that allocation in our COP analysis. Given that Dole's normal methodology results in an unreasonable allocation of fruit costs to CPF, the Department

must determine what would constitute a reasonable allocation of fruit costs. A reasonable fruit cost allocation methodology would be one which reflects the significantly different quality of the fruit parts which are used in the production of CPF versus those which are used in the production of juice products. One approach to deriving such an allocation methodology would be to compare the net realizable value of the CPF versus juice products over a period of years. Net realizable value (NRV) is commonly defined as the predicted selling price in the ordinary course of business less reasonably predictable costs of completion and disposal. See Cost Accounting at 534. Ideally, such a NRV methodology would compare historical cost and sales data for pineapple fruit. products over a period encompassing several years prior to the antidumping proceeding and also would include data for markets where allegations of dumping have not been lodged.

While it would have been preferable to develop an allocation methodology based on historical NRV data in order to reasonably allocate Dole's fruit costs to CPF, we were unable to do so in this investigation because the data were not available and we did not present Dole with an alternative methodology for, allocating fruit costs. However, we intend to do so in any future administrative reviews if an order is issued. Cf. Final Determination of Sales (February 6. 1995) (Department determined that it would have been preferable to disaggregate rose costs but the data were not available and the Department did not present respondent: with an alternative methodology). Such a methodology would enable us to reasonably allocate Dole's fruit costs to CPF, but would not require them to change their method of record-keeping.

Given the fact that the record in this investigation does not contain the data necessary to develop an allocation methodology for Dole based on its historical NRV data. for our final determination, we have allocated Dole': pineapple fruit costs based upon an average of the proprietary fruit cost

allocation percentages used by Malee, SAICO, and TIPCO in their normal accounting systems.

As discussed above, the Department',. practice is to rely on a respondent's books and records prepared in accordance with its home country GAAP unless those accounting principles do not reasonably reflect costs associated with production of the subject merchandise. Although we have relied an Malee's. SAICO's and TIPCO's normal fruit cost allocation methodclogies and have based Dole's fruit costs upon the other three respondents' not cost methodologies, we also will address this respondents' alternative, weight-based allocation methodclogies.

Each of the respondents have argued that a weight-based methodology is appropriate in the context of this investigation because it is based on a non-distortive. neutral, physical criterion, i.e., weight. We believe, however, that allocating the cost of pineapple evenly over the weight is not supportable. Using weight alone as the allocation criteria sets up the illogical supposition that a load of shells, cores, and ends cost just as much as an equal weight of trimmed and cored pineapple cylinders. Significantly, the use of physical weighting for allocation of job costs. i.e., in this case the cost of the pineapple fruit, may have no relationship to the revenue-producing power of the individual products. Thus for example, if the joint cost of a hog were assigned to its various products o: the basis of weight, center-cut pork chops would have the same unit cost as pigs' feet, lard. bacon. ham, and so fort Fabulous profits would be shown for. some cuts. although losses consistently would be shown for other cuts. See Cost Accounting: A Managerial Emphasis at 533.

Much like the hog in the previous example, the pineapple is complied of various part, i.e., the cylinder, core, shells. etc., with significantly different uses and values. Because the parts of the pineapple are not interchangeable when it comes to CPF versus juice production, it would be

unreasonable to value all parts equally by using a weight-based allocation methodology.

We also note that authoritative. accounting literature provides examples of cost allocations in the canning industry dependent on two factors, a quantitative factor and a qualitative factor. See Management Accounts Handbook (Keller 4th ed.) at 11:13, citing "Cost and Sales Control in the Canning Industry", N.A.C.A. Bulletin, Vol. 36 (November 1954) at 376. The output of finished products can be captured in the quantitative measure, which is used to allocate the direct preparation labor costs directly related to the quantity of raw fruit processed. The difference in the relative quality of the fruit used in each product is reflected in a qualitative factor, which is used to allocate the purchase cost of raw materials among products. The various grades or parts of the fruit are assigned a factor reflective of the quality of the fruit used- for each produce With all of this in mind, we believe it is inappropriate to allocate fresh pineapple fruit costs to the various pineapple products so an basis of weight.

The respondents have also, argued that value considerations are inappropriate because the purchased pineapples have. a uniform value throughout and, . therefore, the cost of pineapple properly should be allocated based on consumed weight. Based on verification testing and our review of the record in this case, however, we believe that CPF producers strive first to maximize production of the more valuable. canned fruit products and second, to maximize revenue from the remaining raw material through the production of juice and concentration. As such, the.. respondents place a higher value on the raw material which may be used in the production of subject merchandise. As evidence of this, we noted that the respondents pay a lower price to pineapple suppliers that deliver small fruit. Though two shipments may contain in total the same weight of fresh pineapple, a vendor that delivers smaller fruit will be paid less than one that delivers fruit of a larger sin. This is because the

smaller pineapples will yield a smaller cylinder of quality pineapple fruit which can be used in CPF production.

Accordingly, we reject respondents' claim that, although it is true that during the POI the sales value of canned Pineapples was higher on a per-kilogram basis than that of juice or concentrate, that does not mean that the pineapples used to make the canned pineapples were more expensive than those used to make the juice or concentrate. We do acknowledge that the purchased quantities of small fruit used exclusively in juice production were not significant during the POL but the existence of a "penalty" for small fruit indicates a lower value for such items.

As discussed above, the respondents have also claimed that a value-based allocation methodology is legally impermissible pursuant to *IPSCO*. Contrary to the respondents' arguments, however. *IPSCO* is not controlling in -this case. Nor does *IPSCO* stand for the proposition that in every instance value-based allocations are legally impermissible.

*IPSCO* involved the Department's use of an appropriate methodology for allocating costs between two grades of steel pipe. There were no physical differences between the two grades of pipe, only differences in quality and market value. *IPSCO*, 965 F.2d at 1058. Furthermore, the same materials, labor, and overhead went into the g lot that yielded both grades of pipe. Id. Given these facts, the Department, in its final, determination, allocated production costs equally between the two grades of pipe. The Department reasoned that because. they were produced simultaneously, the two grades of pipe in fact had identical production costs. Id. The CIT rejected the Department's allocation methodology, reasoning that it did not account for differences in value between the two grades of pipe. On appeal, the Court of Appeals for the Federal Circuit held that the CIT erred by substituting its own construction of a statutory provision for the reasonable

interpretation made by the Department, i.e., identical production costs. Id. at 1061.

While the Court of Appeals noted that the CIT's instructions to allocate costs based on relative value in *IPSCO* resulted in an unreasonable circular methodology (i.e., because the value of the-pipe became a factor in determining cost which became the basis for measuring the fairness of the selling price of pipe); nowhere did the ' appellate court indicate that use of an allocation methodology based on relative value was legally impermissible. On the contrary, *IPSCO* suggests that the courts will defer to the Department's preference for reliance on respondents' normal allocation methodologies. particularly where there are significant differences in the raw materials, i.e., the use of the cylinder in production of CPF and the use of the shells. cores, and ends, in production o juice and concentrate. as well as differences in processing,, labor and overhead. Our reasoning here is consistent with *IPSCO* as well as the applicable legislative history. As a result. respondents' reliance on *IPSCO* is misplaced. We also find the respondents' references to the inappropriateness of value-band allocations in a rate-regulated environment to be irrelevant because there is no evidence on the record to suggest that either the subject merchandise or the juice products am sold in a rate-regulated environment.

We have also considered the respondents' comments regarding potentially undesirable consequences on a value-based allocation and find that such scenarios are unlikely to actually take place. However. as with any allocation methodology chosen by the Department, there exists the potential for respondents to manipulate the allocations in opposition to the Department's intent. The respondents' argument that it will be possible to reduce the dumping margin by reducing their prices of subject merchandise in the United States and increasing their of non-subject merchandise is ding. Because it would be most reasonable to bass measures of net realizable value upon long term historical data. it is unclear.

how respondents could use this information to restructure their past results in lower profits on subject merchandise. We also believe it would be inappropriate for the Department to choose a particular course of action based on an argument. However. the Department would; of course, continue to review this information closely through the administrative review process. Thus, we believe that this scenario is unlikely as such action would likely result in lower profits on subject merchandise sales (possibly raising the dumping margin) and reduced market share for non-subject merchandise. We also believe it would be inappropriate for the Department to choose a particular course of action based on an argument that in its essence states, if the Department picks a particular methodology we, the respondents, will take advantage of loopholes in that methodology.

Finally, we disagree with the respondents' claim that petitioners' use of a weight-based allocation for fruit cost establishes that method as industry standard practice. The fact that the petitioners use weight as a basis for income tax purposes is not persuasive. We also note the dichotomy in respondents' reasoning that their own tax (and book) methodology must be rejected. while arguing that petitioners tax accounting records should be controlling. We also note that the respondents did not provide any examples of companies that use weight-based fruit cost allocations as the basis for financial or managerial reporting.

Comment 7

Each respondent claims that its normal accounting method of all allocating certain costs incurred prior to the split off point of the CPF and juice production fines results in distortive and inappropriate cost of production figures.

The petitioners argue that the Department should rely on the respondent companies' normal accounting for these costs.

DOC Position

Because of the proprietary nature of this item, we have addressed the parties' comments and analyzed the issue in detail in our proprietary concurrence memorandum. For TIPCO, SAICO, and Malee, our determination was to allocate the costs following the companies normal methodology for allocating pineapple fruit costs. For Dole, we allocated the costs using the average of the other three respondents normal fruit cost allocation percentages, consistent with our determination in Comment 6 above.

Company Specific Issues
Dole

Comment 8

The petitioners argue that the i methodology used by the Department in its preliminary determination to calculate a dumping margin for Dole based on an estimated quantity of its U.S. sales of Thai-origin merchandise is biased. Specifically, the petitioners contend that this methodology fails to take into account the fact that prices vary within UPC categories because Dole's Philippine-sourced merchandise is sold at a lower price than its Thai-sourced merchandise. In order to apply a methodology that is less distortive and more accurate, the petitioners assert that the Department should calculate one overall Thai-to-Philippine shipment ratio and apply this ratio to the total amount of potential uncollectible dumping duties (PUDD) calculated for all UPC codes.

Dole asserts that no possible distortion could arise from the methodology used by the Department in its preliminary determination. Although prices vary within a given

UPC code, Dole argues that there is no correlation based on contract prices and standard price fists that do not distinguish between Philippine-and Thai-sourced merchandise. Therefore. Dole asserts that any possible dumping attributable to imports from Thailand is directly related to the volume of imports sourced from Thailand.

DOC Position

We agree with Dole, in part. At verification we confirmed that Dole sells both its Thai- and Philippine-origin merchandise at the same price in the United States. Therefore, the. petitioners' assertion that Dole's Philippine-sourced sales were sold at prices lower than its Thai-sourced sales is unfounded. In addition, contrary to the petitioners'. assertion. the application of a single shipment ratio to the total PUDD for all sales would be distortive because this approach assumes that the shipment ratio between Thai-and Philippine-sourced merchandise is constant across all UPCs. This is not true. The shipment data confirmed at verification shows that the ratio of Thai- to Philippine-sourced merchandise varied immensely between UPCs. The petitioners' approach blurs the vast differences between these UPC shipment ratios.

In order to calculate a less than fair value margin based on an estimated quantity of Dole's U.S. sales of Thai-origin merchandise during the POI, we have continued to weight average the dumping margin for each UPC product category by the ratio of shipments of subject merchandise from Thailand to the total volume shipped from both Thailand and the Philippines during the last seven accounting periods of 1993. In calculating the ratios. we excluded all negative shipment quantities reported -by Dole because these quantities do not represent actual shipments during the second half of 1993. Instead, these quantities reflect the reclassification of merchandise from one UPC category to another.

Comment 9

Dole argues that the Department's preliminary margin is grossly distorted due to the inclusion of a single, aberrant third country sale. Dole asserts that this sale is outside the ordinary course of trade and should be excluded from the Department's calculation of FMV for the following reasons: (1) The sale was of a product type sold only once in the third country market during the POI; (2) the sale constituted a negligible portion of the third country database; (3) the sale was not to a regular cus6mer, (4) the terms of sale were uncommon for the compared to the average selling price for other products of the same can size during the POI.

In addition Dole argues that if it were subject to an antidumping order. it would not need to raise its U.S. prices or lower its Carman prices to avoid the imposition of dumping duties. Therefore Dole asserts that no purpose would be served by an antidumping duty order if it were to be based on this sale. In support of its position Dole cites *Melamine Chemicals, Inc. v. United States*, 732 F.2d 924 (Fed. Cir. 1984) (Melamine Chemicals), where the Court of Appeals emphasized that the purpose of the antidumping law is, "to discourage the practice of selling in the United States at LTFV * * * . That purpose would be ill-served by application of a mechanical formula to find LTFV sales where none existed."

The petitioners argue that this sale is not outside of the ordinary course of trade and should be included in the calculation of FMV. The petitioners contend that the terms of sale were not unusual because the same sales terms were offered on numerous third country sales during the POL In addition, the petitioners assert customer was regular because Dole made several sales to this same customer during the POL. Finally. the petitioners contend that Dole's assertion that the selling price for this sale was abnormally high is because sales made at prices below the COP were included in Dole's calculation of the average selling price for this can size. The petitioners argue that the fact that this sale was sold at a higher

price than sales sold at prices below the COP does not provide evidence that the price is aberrational.

DOC Position

We agree with Dole that the sale was outside the ordinary course of trade as defined in section 771(15) of the Act and have excluded it from the calculation of FMV. We agree with the petitioners that the customer and terms of sale associated with this sale were not unique. Further, Dole's reliance on Melamine Chemicals is misplaced. Melamine Chemicals involved the issue of whether the Department's issuance and application of a regulation concerning exchange rate fluctuations during a less than fair value investigation was lawful. Notably. the sentence immediately following the ones quoted by Dole states, "A finding of LTFV sales based on a margin resulting solely from a factor beyond the control of the exporter would be unreal, unreasonable, and unfair."

The petitioners argue that both inventory write-downs and inventory write-offs have the same function of recognizing losses of future revenue and thus should be treated the same for COP.

Malee argues that inventory write-downs are not a cost of production and should not be included. in COP. It claims that the only effect of these adjustments is on the value of inventory for balance sheet purposes, and on cost of goods sold for income statement purposes. Further. Malee argues that there is a fundamental difference between COP and cost of goods sold and states that the effect of such revaluation is self-canceling over time. Malee claim that these write-downs are a method of absorbing losses more gradually as inventory declines in expected market value.

DOC Position

We agree with the petitioners that the inventory write-downs should be reflected in Malee's production costs. During verification, we noted that inventory write-downs are a normal, recurring period adjustment made annually by Malee. Also, we agree with the petitioners that such adjustments are part of the fully-absorbed cost of goods sold and should be included in the calculation of COP and CV. We therefore adjusted the G&A factor calculation to include the amount of inventory write-downs.

Comment 45

Malee asserts that certain proprietary payments, applied as offsets to COM, should be determined based upon the amounts earned rather than the amounts received during the POL It claims that it is more appropriate to match the income earned during the POI with the expense incurred. It would be inappropriate, according to Malee, to use the amounts received during the POL since they relate to production in a prior period.

The petitioners did not comment on this issue.

DOC Position

We agree with Malee, in part. We noted that certain proprietary payments are accrued at the time production occurs and the payment is effectively earned. However, we noted that other payments are not recorded as earned until a letter is received confirming the amount to be paid to Malee. This letter is normally received after the production is completed. We agree with Malee that the actual receipt date is a function of timing and cash flow and has no relationship to the production occurring in that same period. Therefore, we adjusted the offset amounts to reflect the payments earned during the POI



rather than the amounts received by Malee during the same period.

Comment 46

Malee asserts that the Department should recalculate COP and CV using the can and lid costs which were submitted to the Department at the start of verification as a correction of an error.

The petitioners claim that the revisions submitted at the start of verification should not have been accepted by the Department. These corrections adjusted per kilogram costs by a significant percentage, according to the petitioners. They argue that the explanation provided for this on-or was inadequate and should not have been accepted by the Department.

DOC Position

We agree with Malee in part. We noted that certain proprietary payments are accrued at the time reviewed Malee's explanation for its submitted cost revisions, which are described in the March 1, 1995, submission, and considered it to be reasonable. During verification, we reconciled the revised can and lid costs to stock reports and to the general ledger. Therefore, we accepted these costs for purposes of calculating COP and CV.

Comment 47

Malee states that the Department should recalculate COP and CV using the verified drained weight/net weight ratios, which were submitted at the start of verification. It also requests that the Department calculate the interest offset using

the consolidated financial statements, as discussed at verification.

The petitioners did not comment on these issues.

DOC Position

We agree with Malee. We noted that certain proprietary payments are accrued at he time production occurs and the payment is effectively earned. However, we noted that other payments are not recorded as earned until a letter is received confirming the amount to be paid to Malee. This letter is normally received after the production is completed. We agree with Malee that the actual receipt date is a function of timing and cash flow and has no relationship to the production occurring in that same period. Therefore, we adjusted the offset amounts to reflect the payments earned during the POI rather than the amounts received by Malee during the same period.

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The petitioners claim that the revisions submitted at the start of verification should not have been accepted by the Department. These corrections adjusted per kilograms costs by a significant percentage, according to the petitioners. They argue that the explanation provided for this error was inadequate and should not have been accepted by the Department.

DOC Position

We agree with Malee. We reviewed Malee's explanation for its submitted cost revisions, which are

described in the March 1, 1995, submission, and considered it to be reasonable. During verification, we reconciled the revised can and lid costs to stock reports and to the general ledger. Therefore, we accepted these costs for purposes of calculating COP and CV.

Comment 47

Malee states that the Department should recalculate COP and CV using the verified drained weight/net weight ratios, which were submitted at the start of verification. It is also requests that the Department calculate the interest offset using the consolidated financial statements, as discussed at verification.

The petitioners did not comment on these issues.

**DOC Position**

We agree with Malee. We have used the submitted and reviewed drained weight/net weight ratios to calculate fruit costs and we used the consolidated financial statements to calculate CV interest expanse.

**Continuation of Suspension of liquidation**

We are directing the Customs Service to continue to suspend liquidation of all entries of CPF from Thailand, as defined in the "Scope of the Investigation" section of this notice, that are entered, or withdrawn from warehouse. for consumption on or after January 11, 1995. the date of publication of our preliminary determination in the Federal Register. The Customs Service shall require a cash deposit or posting of a bond equal to the estimated amount by which the FMV of the merchandise subject to this investigation exceeds the U.S. price, as shown below. This suspension of liquidation will remain in effect until further notice.

The weighted-average dumping margins are as follows:

| Producer/Manufacturer exporter | Weighted-average margin |
|---|---|
| Dole | 2.36 |
| TIPOO | 38.68 |
| SAICO | 55.77 |
| Malee | 43.43 |
| All Others | 25.76 |

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our . As our final determination is affirmative, the ITC will determine whether these imports are causing material injury, or threat of material injury, to the industry in the United States, within 45 days. If the ITC determines that material injury, or threat of material injury, does not exist. the proceeding will bet and all securities posted will be refunded or cancelled. If the ITC determine that the material injury, to the industry in the United States, within 45 days. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing Customs officials; to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

This determination is published pursuant to section 735(d) of the Act and 19 CFR 353.20(a)(4).

**(e) Constructed value**

For purposes of this subtitle, the constructed value of imported merchandise shall be an amount equal to the sum of -

(1) the cost of materials and fabrication or other processing of any kind employed in producing the merchandise, during a period which would ordinarily permit the production of the merchandise in the ordinary course of business;

Supreme Court, U.S.
FILED
MAR 27 2000
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(2)

No. 99-1246

# In the Supreme Court of the United States

DOLE FOOD COMPANY, INC., ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals erred in concluding that the Department of Commerce (Commerce) reasonably applied the antidumping statute, 19 U.S.C. 1673 *et seq.*, in rejecting petitioners' asserted methodology for allocating the cost of raw pineapple fruit between the production of canned pineapple fruit and the production of pineapple juice.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 187 F.3d 1362. The opinions of the Court of International Trade are reported at 946 F. Supp. 11 (Pet. App. 17a-56a) and 19 I.T.R.D. 1339 (App., *infra*, 1a-3a).

### JURISDICTION

The judgment of the court of appeals was entered on July 28, 1999. The petition for rehearing was denied on October 28, 1999 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on January 26, 2000. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The federal antidumping statute, 19 U.S.C. 1673 *et seq.*, invests the Department of Commerce with authority to impose "antidumping duties" on foreign merchandise sold in the United States where two conditions are met. First, Commerce must determine that the merchandise "is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673(1). Second, the United States International Trade Commission must determine either that such sales are materially threatening or injuring an existing industry in the United States, or that they are materially retarding the establishment of an industry in the United States. 19 U.S.C. 1673(2). Where imposition of an antidumping duty is warranted, the amount of the duty is to equal "the amount by which the normal value exceeds the export price * * * for the merchandise." 19 U.S.C. 1673. That amount is known as the "dumping margin."

Commerce determines a product's normal foreign market value (FMV) with reference to either: (1) the price of such or similar merchandise sold in the exporting country or a third country; or (2) the constructed value (CV) of the imported merchandise. 19 U.S.C. 1677b(a)(1) and (4). If Commerce determines FMV by reference to product price, the statute directs Commerce to exclude from its determination all sales made below the cost of production (COP) if those sales were made over an extended period of time, in substantial quantities, and at prices that preclude recovery of all costs within a reasonable period of time in the normal course of trade. See 19 U.S.C. 1677b(b)(1). Commerce has promulgated regulations implementing this approach by providing that COP is "based on the

cost of materials, fabrication, and general expenses, but excluding profit, incurred in producing such or similar merchandise." 19 C.F.R. 353.51(c) (1994). If Commerce determines FMV by reference to CV, the statute directs Commerce to base its determination on the sum of (1) the cost of materials and fabrication, (2) an amount for general expenses and profit, and (3) the cost of all containers and coverings. 19 U.S.C. 1677b(e).

2. In 1994, in response to a petition filed on behalf of the domestic canned pineapple fruit industry, Commerce initiated an investigation of canned pineapple fruit (CPF) imports from Thailand to determine whether such imports were being sold at prices below their fair value. See Canned Pineapple Fruit From Thailand, 59 Fed. Reg. 34,408 (Dep't Commerce 1994). Commerce's investigation covered petitioners and three other entities: The Thai Pineapple Public Co., Ltd. (TIPCO); Siam Agro Industry Pineapple and Others Co., Ltd. (SAICO); and Malee Sampran Factory Public Co., Ltd. (Malee).

As part of its investigation, Commerce issued questionnaires to petitioners and later conducted an on-site inspection in Thailand to verify petitioners' responses to the questionnaires. That inquiry revealed that: (1) petitioners purchased fresh pineapple fruit (C.A. App. 63); (2) petitioners utilized that fresh pineapple fruit to produce both CPF and pineapple juice (*id.* at 64); (3) petitioners purchased some quantities of other fruit specifically for making juice products and paid a discounted price for that fruit (*id.* at 586); (4) petitioners' financial accounting system was in accordance both with generally accepted accounting principles (GAAP) in the United States and with Thailand's statutory accounting rules (*id.* at 66); (5) petitioners' financial accounting records allocated the

entire cost of the fresh pineapple fruit to the production of CPF, and allocated none of that cost to the production of pineapple juice (*id.* at 118); and (6) petitioners responded to Commerce's questionnaires by providing cost allocations based not on their financial accounting records, but on the relative weight of CPF and pineapple juice (allocations that petitioners had developed exclusively for the purposes of responding to Commerce's investigation) (*id.* at 580, 588).

Commerce's investigation culminated in a Final Determination published in the *Federal Register*. See Pet. App. 57a-100a. In its Final Determination, Commerce explained that when determining COP, its practice is "to adhere to an individual firm's [ ] recording of costs in accordance with GAAP of its home country if [Commerce] is satisfied that such principles reasonably reflect the costs of producing the subject merchandise." *Id.* at 82a.* Commerce further stated that "[n]ormal accounting practices provide an objective standard by which to measure costs, while allowing the [companies under investigation] a predictable basis on which to compute those costs." *Ibid.*

Turning to the instant case, Commerce explained that it had examined whether petitioners and the other companies under investigation employed reasonable

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* Commerce noted that its practice in this area is consistent with the legislative history of the statute's COP provision. Pet. App. 82a. In the legislative history accompanying the Trade Reform Act of 1973, the House Ways and Means Committee stated that "in determining whether merchandise has been sold at less than cost, [Commerce] will employ accounting principles generally accepted in the home market of the country of exportation if [Commerce] is satisfied that such principles reasonably reflect the variable and fixed costs of producing the merchandise." H.R. Rep. No. 571, 93d Cong., 1st Sess. 71 (1973).

fruit cost allocation methods. After noting that "each company had used its recorded fruit cost allocation methodology for at least a number of years," Pet. App. 83a, Commerce found "no evidence" that petitioners or any of the other companies under investigation "had not relied historically upon its recorded allocation percentages to compute its production costs." *Ibid.* Because the normal allocation methodologies for TIPCO, SAICO, and Malee were "consistent with Thai GAAP and appear to reasonably allocate fruit costs to CPF," Commerce adjusted those companies' submitted fruit costs "to reflect the allocations as calculated and verified under each company's normal accounting system." *Id.* at 85a. However, because it found that petitioners' "normal allocation methodology results in an unreasonable allocation of fruit costs to CPF," *ibid.*, Commerce "allocated [petitioners'] pineapple fruit costs based upon an average of the proprietary fruit cost allocation percentages used by Malee, SAICO, and TIPCO in their normal accounting systems." *Id.* at 86a-87a.

Commerce's Final Determination resulted in a dumping margin for petitioners of 2.36 %. After amending its determination to correct certain ministerial errors, Commerce assessed a revised dumping margin for petitioners of 1.73 %. See Canned Pineapple Fruit From Thailand, 60 Fed. Reg. 36,775 (Dep't Commerce 1995).

3. Petitioners and several other parties challenged the Final Determination in the Court of International Trade. After consolidating those actions, the court held, *inter alia*, that Commerce erred in rejecting petitioners' reported allocation methodology in favor of an average of the allocation percentages historically used by the other three companies. Pet. App. 32a. The court

concluded that the cost allocation methodology used in Commerce's Final Determination was inconsistent with the standards outlined by the Court of Appeals for the Federal Circuit in *IPSCO, Inc.* v. *United States*, 965 F.2d 1056 (1992) (*IPSCO III*). In the court's view, *IPSCO III* held that "value-based allocation violated the antidumping statute, and also found that * * * [a] weight-based methodology was the correct interpretation of the law." Pet. App. 38a-39a. Thus, the court remanded the matter to Commerce, stating that "Commerce may choose to accept the weight-based allocation methodologies put forth by * * * [petitioners] if they are otherwise acceptable, because these are cost, not price-based, methodologies, or it may rely on another non-output price-based cost allocation methodology." *Id.* at 42a. Commerce complied with the remand order, and the Court of International Trade then sustained Commerce's action. App., *infra*, 2a-3a.

4. The Court of Appeals for the Federal Circuit reversed the Court of International Trade's original remand order. Pet. App. 1a-14a. The court explained that "[t]he statute does not expressly authorize any specific allocation methodologies between items produced jointly," and that "[a]s a general rule, an agency may either accept financial records kept according to generally accepted accounting principles in the country of exportation, or reject the records if accepting them would distort the company's true costs." *Id.* at 7a (citing, *inter alia*, *IPSCO III*, 965 F.2d at 1060). In this case, the court noted that petitioners "agree[] that [their] normal allocation methodology, allocating 100% of the pineapple fruit cost to canned pineapple fruit, was distorted because it resulted in an overstatement of the cost of production for canned pineapple fruit." *Id.* at 10a. In contrast, the court stated that "[t]he meth-

odologies relied upon by Commerce in making its determinations are presumptively correct." *Id.* at 11a. Because it was "not presented with any information that would rebut [that] presumptive correctness" in this case, the court stated that it was "satisfied that Commerce's decision to use an average of the fruit cost allocation percentages used by TIPCO et al. to determine [petitioners'] cost of materials for canned pineapple fruit is reasonable and supported by substantial evidence." *Ibid.*

In reaching its decision, the court of appeals made clear that its prior decision in *IPSCO III* does not apply to this case. Pet. App. 11a. The court stressed that "pineapple fruit is not a homogeneous raw material like the raw material * * * [at issue] in *IPSCO III*, and the production process [at issue here] is entirely different for the various pineapple products produced." *Id.* at 13a. Unlike the cost allocation methodology employed by the Court of International Trade in *IPSCO III*, "[t]he methodology used by Commerce [in this case] was neither price-based nor circular" because "Commerce's allocation of the cost of the raw pineapple fruit between canned pineapple fruit and other products was not based on the selling price or output value of these products." *Ibid.* Accordingly, the court held that "under the facts of this case, * * * the Court of International Trade improperly held that *IPSCO III* was controlling precedent." *Ibid.*

**ARGUMENT**

Petitioners contend that the court of appeals misconstrued its decision in *IPSCO III* in holding that Commerce's Final Determination was based on a reasonable interpretation of the antidumping statute and was supported by substantial evidence. Petitioners

are incorrect. The decision of the court of appeals is correct and does not conflict with any decision of this Court, the Federal Circuit, or any other court of appeals. Further review is therefore not warranted.

1. The antidumping statute directs the courts to uphold Commerce's interpretation and application of the statute unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. 1516a(b)(1)(B)(i). Because Commerce is the "master of antidumping law," *Daewoo Elecs. Co.* v. *International Union of Elec. Workers*, 6 F.3d 1511, 1516 (Fed. Cir. 1993), cert. denied, 512 U.S. 1204 (1994), reviewing courts defer to Commerce in its selection and development of proper methodologies for determining dumping margins. See *Fujitsu Gen. Ltd.* v. *United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996) (court "accords deference to the determinations of the agency that turn on complex economic and accounting inquiries"). In this case, the court of appeals noted petitioners' concession that their "normal allocation methodology, allocating 100% of the pineapple fruit cost to canned pineapple fruit, was distorted because it resulted in an overstatement of the cost of production for canned pineapple fruit." Pet. App. 10a. In light of that concession, petitioners cite no authority supporting their assertion that the court of appeals erred in deferring to Commerce's reliance on the average cost allocation percentages used by CPF producers under similar circumstances. Accordingly, the court of appeals properly deferred to Commerce's Final Determination in this case.

2. The decision of the court of appeals does not conflict with its earlier decision in *IPSCO III*. In that case, the Court of International Trade ordered Commerce to use domestic prices when allocating costs

between prime and limited-service oil country tubular goods (OCTG). See *IPSCO, Inc.* v. *United States*, 714 F. Supp. 1211 (1989). The Federal Circuit found that order to be premised on "an unreasonable circular methodology": "The selling price of pipe became a basis for measuring the fairness of the selling price of pipe." *IPSCO III*, 965 F.2d at 1061. The court held that such "circular reasoning contravened the express requirements of the statute which set forth the cost of production as an independent standard for fair value." *Ibid.*

This case materially differs from *IPSCO III* in at least two ways. First, there are important physical differences between the materials at issue in the two cases. The OCTG at issue in *IPSCO III* was produced from a "homogeneous raw material." Pet. App. 13a. In contrast, the raw material used to produce CPF consist of cored cylinders, cores, shells, and ends. Thus, "[a]lthough the raw material was purchased as a whole, for a set price per unit of weight, the parts of the pineapple differ in their usefulness and value." *Ibid.* These physical differences are significant because the homogeneous nature of the raw material used to produce OCTG supported Commerce's determination in that case to base its raw material cost allocations on weight. In this case, the varied nature of the raw material at issue makes reliance on weight as a cost allocator inappropriate. Second, the methodology employed by Commerce in this case "reflected the raw material allocations of TIPCO et al. as shown by their books and records." *Ibid.* Because "each company had used its recorded fruit cost allocation methodology for at least a number of years," *id.* at 83a, Commerce's use of that methodology in petitioners' case was neither

unreliable nor circular in the way the methodology at issue in *IPSCO III* was.

Moreover, even if the court of appeals' decision in this case were inconsistent with *IPSCO III*, such intra-circuit inconsistencies are best resolved by the court of appeals concerned and generally do not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). Petitioners identify no decision of this Court or any other court of appeals with which the decision below conflicts.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2000

**APPENDIX**

UNITED STATES COURT
OF INTERNATIONAL TRADE

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No. 95-08-01064, SLIP OP. 97-32

THE THAI PINEAPPLE PUBLIC CO., LTD., ET AL., PLAINTIFFS

AND

DOLE FOOD CO., INC., ET AL., PLAINTIFF-INTERVENORS

*v.*

THE UNITED STATES, DEFENDANT

AND

MAUI PINEAPPLE CO., LTD., DEFENDANT-INTERVENOR

---

[Filed: March 18, 1997]

---

**OPINION**

RESTANI, Judge:

This matter is before the court following remand of an antidumping duty determination.

While the parties may dispute some of the court's conclusions in Slip Op. 96-182 issued herein, there

seems to be no dispute that the Department of Commerce complied with the court's directions.

The one issue which arises solely from the remand is Commerce's decision to correct its own ministerial error. Apparently it programmed its computer with an improper currency conversion factor when the gross unit prices were already reported in U.S. dollars.

On several occasions this court has upheld decisions of Commerce not to correct errors which could have been discovered by the parties in a timely manner. This is particularly appropriate when belated error correction will have a ripple effect leading to further administrative proceedings or fact finding. The court does not ordinarily consider it an abuse of discretion if Commerce decides to correct isolated mistakes of its own. See *Cemex* v. *United States*, Slip Op. 96-170, at 2 (Oct. 24, 1996) ("programming errors are particularly susceptible to correction without administrative disruption"). As this matter was uncovered during a remand proceeding subject to narrowly drawn directions from the court, however, the better practice would have been for Commerce to have requested permission to correct the error. As Commerce's action was not clearly ultra vires, and resulted in proper error correction the court sees no purpose to ordering another remand to do what has been done.

The remand results will be sustained.

## JUDGMENT

This case having been submitted for decision and the Court, after deliberation, having rendered a decision therein; now, in conformity with that decision.

IT IS HEREBY ORDERED: that the determination on remand of the Department of Commerce is sustained and judgment is hereby entered accordingly.

Supreme Court, U.S.
FILED
MAR 27 2000
CLERK

No. 99-1246

IN THE
# Supreme Court of the United States

DOLE FOOD COMPANY, INC.,
DOLE PACKAGED FOODS COMPANY,
AND DOLE THAILAND, LTD.,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF COMMERCE,
AND MAUI PINEAPPLE CO., LTD.,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF IN OPPOSITION OF RESPONDENT MAUI PINEAPPLE CO., LTD.

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## QUESTIONS PRESENTED

1. Whether a reviewing court's approval of a particular cost allocation methodology in an antidumping case involving a pipe product constitutes "binding judicial precedent" controlling the selection of the cost allocation methodology in a subsequent case involving a pineapple product given (i) the statute's clear grant of discretion to the U.S. Commerce Department to choose how producers' costs are allocated, (ii) the factually complex nature of cost allocations in antidumping cases, (iii) the expertise of Commerce in selecting the appropriate methodology, and (iv) the clear distinction between pineapple and pipe products?

2. Whether the U.S. Commerce Department's finding that the production process and costs associated with pineapple production are sufficiently different from the production process and costs associated with the production of pipe so as to justify application of different cost allocation methodologies in each instance?

## STATEMENT OF CORPORATE AFFILIATIONS

Maui Pineapple Co., Ltd. is a wholly owned subsidiary of Maui Land and Pineapple Co., Inc., a publicly traded company.

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## STATEMENT OF THE CASE

Dole Food Company, Inc., Dole Packaged Foods Company, and Dole Thailand, Ltd. (collectively, "Dole" or "Petitioners") have petitioned this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit ("appellate court" or "Federal Circuit") in Thai Pineapple Public Co., Ltd. v. United States, 187 F.3d 1362 (Fed. Cir. 1999) ("Thai Pineapple II"). Respondent, Maui Pineapple Co., Ltd. ("Maui"), opposes this petition. As set forth below, Dole's petition lacks merit because it (1) raises a factual issue that is of limited importance in the overall scheme of the law, (2) mischaracterizes as "binding precedent" a case that is clearly distinguishable on its facts, and (3) challenges a decision of the U.S. Department of Commerce ("Commerce") that the Federal Circuit correctly found to be based on substantial evidence. Dole's petition therefore should be rejected.

### A. Cost Allocations and the Underlying Administrative Determination

This case has its genesis in an antidumping petition filed by Respondent Maui, the only U.S. producer of canned pineapple. In 1994, Maui petitioned Commerce to investigate whether various producers of canned pineapple from Thailand were selling pineapple in the United States at "less than fair value," an action that merits the imposition of offsetting tariffs under U.S. antidumping duty law. Commerce ultimately found that the Thai producers, including Dole, were selling pineapple into the United States at "dumped" prices, using Thai producers' production costs as the benchmark for measuring dumping. See Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit From Thailand, 60 Fed. Reg. 29,553 (June 5, 1995), ("Thai Pineapple"), as amended, 60 Fed. Reg. 36,775 (July 18, 1995) (Pet. App. at 57a-101a).

The measurement of Dole's production costs was an important and complex element of Commerce's dumping calculation. While the antidumping statute does not specify the precise methodology that Commerce must use to calculate cost of production, Congress has instructed Commerce to "employ accounting principles generally accepted in the home market country of exportation." H.R. Rep. No. 571, 93d Cong., 1st Sess. 71 (1993). Thus, Commerce normally bases its cost allocations on standard accounting principles as reflected in a company's books and records when the record establishes that the company's accounting practices reflect the actual costs incurred in producing the merchandise. This fact-based approach to analyzing a company's production costs for antidumping purposes has been affirmed repeatedly by reviewing courts. See, e.g., Hercules, Inc. v. United States, 673 F. Supp. 454, 491 (Ct. Int'l Trade 1987) (upholding reliance on a company's normal books and records "in the absence of substantiating evidence that this methodology was a deviation or misrepresentation of {the company's} costs").

Notwithstanding, the statute provides Commerce with discretion to adjust or modify its cost allocation methodology on a case-by-case basis to account for the facts of each case. Thus, it is not true, as Dole claims, that there are only "two possible approaches" to the allocation of production costs. Petition at 2. Rather, this is a methodological determination that is left to the discretion of the agency based on the particular facts at issue. The lower court decision upon which Dole relies, Thai Pineapple Public Co., Ltd. v. United States, 946 F. Supp. 11 (Ct. Int'l Trade 1996), ("Thai Pineapple I"), effectively recognized this point by instructing Commerce to employ a "non-output price-based" cost allocation methodology (Pet. App. at 55a), thus leaving the precise methodology for measuring costs to the discretion of the agency.

Commerce's calculation of production costs in this case was particularly complicated given that Dole and the remaining Thai companies produced both pineapple, the focus of the agency's investigation, as well as pineapple juice and juice concentrate, which were outside the scope of the investigation. All of these products are produced using separate parts of the same raw material, fresh pineapple fruit. As a result, they share joint raw material costs. Because of this overlap in production costs, in calculating the Thai producers' cost of production, Commerce had to allocate a portion of the shared costs between canned pineapple and its "co-products," pineapple juice and juice concentrate.

The debate surrounding the proper methodology for allocating costs between canned pineapple and other pineapple products concerned whether to base the allocation on the weight of the parts of the fruit used to produce the pineapple products or their value. Because the parts of the pineapple used to produce canned pineapple fruit weigh less than the parts of the pineapple used to produce other pineapple products, namely juice, production costs for canned pineapple fruit under a weight-based methodology are lower, leading in turn, to lower allocated production costs and lower antidumping margins. While Dole admits that canned pineapple and pineapple juice "each has commercial significance in its own right," (Petition at 2) -- and thus implicitly endorses a value-based methodology -- it nonetheless argues that Commerce should have based its cost allocations on weight. Id. at 3.

Having examined the facts carefully, and consistent with its practice, Commerce ultimately determined to allocate pineapple fruit costs using the methodology reflected in the Thai producers' books and records. Commerce explained its decision as follows:

> the Department {Commerce} examined whether each respondent's normal fruit cost allocation methodology was reasonable. In examining each respondent's books and records at verification we found that each company had used its recorded fruit cost allocation methodology for at least a number of years. Furthermore, we found no evidence that each respondent had not relied historically upon its recorded allocation percentages to compute its production costs. In addition, evidence on the record, i.e., audited financial statements, indicates that each respondent's normal allocation methodology was accepted by its independent auditors. Given the auditors' acceptance of the respondents' financial statements and any lack of evidence to the contrary, we conclude that each respondent's normal allocation methodology is consistent with generally accepted accounting principles practiced in Thailand.

Thai Pineapple, 60 Fed. Reg. at 29,559 (Pet. App. at 83a).

Commerce also carefully considered the alternative weight-based methodology offered by the Thai producers. In so doing, it stated that

> allocating the cost of pineapple evenly over weight is not supportable. Using weight alone as the allocation criteria sets up the illogical supposition that a load of shells, cores and ends cost just as much as an equal weight of trimmed and cored pineapple cylinders.

Id. at 29,560. In other words, Commerce concluded that allocating pineapple fruit costs solely on the basis of weight failed to account for the qualitative difference and revenue-generating power of the various parts of the pineapple. Thus, for three Thai producers, Commerce allocated fruit costs according to their normal books and records, which were historically used and approved by independent auditors, based on Thai accounting principles, and adjusted periodically for accuracy. With respect to Dole, because Commerce found (and Dole conceded) that the allocation methodology reflected in its normal books and records was distortive, Commerce allocated Dole's costs based upon the average of the fruit cost allocation percentages used by the other three respondents in their normal accounting systems. Id.

### B. The Decision of the Appellate Court in *Thai Pineapple*

On appeal in Thai Pineapple II, the Federal Circuit affirmed the methodology used by the agency in allocating Dole's fruit costs. It did so because it concluded that "Commerce's interpretation was reasonable, supported by substantial evidence, and thus entitled to deference." Pet. App. at 14a. It further found that the lower court had erred by "reject{ing} a reasonable allocation methodology which Commerce determined recognized the use and value of the raw material." Pet. App. at 13a.

In reaching this determination, the Court noted, inter alia, that Commerce found the books and records of the Thai producers

> to be reasonably reflective of their costs because their normal allocation methodologies were used for a number of years, accepted by independent auditors and historically relied

> upon to present important financial information to shareholders, lenders, tax authorities, auditors, and other third parties.

Pet. App. at 8a. In addition to citing the factual bases in support of the agency's conclusion, the Court further recognized that "{a}ntidumping investigations are complex and complicated matters in which Commerce has particular expertise and thus, Commerce's determinations are entitled to deference." Pet. App. at 9a.

Importantly, the court agreed that its earlier decision in IPSCO, Inc. v. United States, 965 F.2d 1056 (Fed. Cir. 1992) ("IPSCO III"), did not control the methodology chosen by Commerce in Thai Pineapple. Pet. App. at 11a. Rather, after examining the relevant facts concerning the production and cost of producing the pipe products at issue in IPSCO, (Pet. App. at 12a-13a), the Federal Circuit concluded that "{u}nder the facts of that case, Commerce's use of a weight based allocation methodology was a reasonable interpretation of the statute." Pet. App. at 13a (emphasis added). In contrast, the court noted that "pineapple fruit is not a homogenous raw material like the raw material used to make the pipe in IPSCO III, and the production process is entirely different for the various pineapple products produced." Id. Given these clear differences, the court held that "under the facts of this case, we conclude that the Court of International Trade improperly held that IPSCO III was controlling precedent." Id. (emphasis added). The Federal Circuit thus carefully distinguished its own precedent in finding that the facts in Thai Pineapple justified a different outcome from IPSCO III -- a task it was uniquely positioned to perform.

## C. The *IPSCO* Decisions

Dole's Petition revolves around an alleged rule articulated by the Federal Circuit in IPSCO III on "how to approach the question of apportioning input costs of co-products." Petition at 10. According to Dole, in IPSCO III, the court "ruled that there is one way and one way only of allocating input costs as between co-products, and that is on the basis of their inherent characteristics such as weight." Id. Dole's recitation of the IPSCO III "rule," however, omits important aspects of the decision.

The IPSCO line of cases involved an appeal from an affirmative antidumping duty determination issued by Commerce in Oil Country Tubular Goods ("OCTG") from Canada, 51 Fed. Reg. 21,782 (June 19, 1986), as amended, 51 Fed. Reg. 29,579 (Aug. 19, 1986). The merchandise under investigation in that case was steel pipe for oil and gas wells produced in "prime" and "limited service" (or "off-spec") grades. Unlike the situation with pineapples, the two products were sold for the same uses and were produced using the exact same manufacturing process, but differed in their ultimate market price due to the differing quality of the merchandise.

In assigning costs to the merchandise in OCTG, Commerce allocated costs equally between prime and off-spec pipe because the products were produced simultaneously. IPSCO appealed Commerce's allocation methodology, claiming that the agency should have allocated costs by treating off-spec pipe as a by-product. See IPSCO, Inc. v. United States, 687 F. Supp. 633 (Ct. Int'l Trade 1988). On remand, Commerce explained the reasons for its allocation, including its concern that IPSCO itself allocated costs on a co-product basis in its financial statements, which were based on generally accepted accounting principles. See IPSCO, Inc. v. United States, 714 F. Supp. 1211, 1213 (Ct. Int'l Trade 1989). The lower court,

however, rejected Commerce's approach and directed the agency to revise its methodology by allocating costs between prime and off-spec pipe based on their proportionate market value.

On appeal in IPSCO III, the Federal Circuit reversed. The appellate court overturned the lower court on the ground that it had wrongly substituted its own construction of the statute for that of the agency. The court explained, inter alia, that "{Commerce's} original methodology for calculating constructed value was a consistent and reasonable interpretation of {the statute}," which requires "consideration of actual production costs." 965 F.2d at 1061, 1059. While the Federal Circuit expressed concern regarding the potential circularity that could result by allocating costs using the value-based methodology ordered by the lower court, it merely concluded, in dicta, that the statute establishes cost of production as an independent standard for fair value. Id. at 1061. Thus, IPSCO III does not create an absolute rule precluding Commerce from allocating costs on the basis of value, as Dole claims; rather, the only rule articulated in IPSCO III is that a court may not substitute its judgment for that of an agency when the agency's approach under the facts at issue constitutes a reasonable interpretation of the statute.

## REASONS FOR DENYING THE WRIT

### I. THE FEDERAL CIRCUIT'S DECISION IS NOT SUFFICIENTLY IMPORTANT TO REQUIRE THE EXERCISE OF THIS COURT'S JURISDICTION

This case is not one that requires the exercise of this Court's extraordinary and discretionary jurisdiction. Contrary to Dole's claims, there is no important principle of administrative law at issue here; rather, the issue presented

concerns an obscure aspect of antidumping duty law that turns on application of an agency's technical expertise to a highly complex set of facts. Under these circumstances, this Court should not expend its valuable resources attempting to resolve a dispute with such limited implications for future litigants in antidumping lawsuits.

### A. The Issue Raised By Petitioners Is a Factual Question With Extremely Limited Implications for Other Litigants

The issue in this case -- how the costs of producing canned pineapple should be allocated among shared raw materials for purposes of calculating the "cost of production" in an antidumping duty case -- is of minor importance in the area of administrative law generally, and even in the specific context of antidumping duty law. It is unlikely to recur and is too narrow to warrant review by this Court on certiorari. Indeed, even Dole concedes that "the specific point of trade law that is the subject matter of this case is somewhat obscure . . . ." Dole Petition at 2. Dole also implicitly admits that its Petition is motivated more by financial concerns than by jurisprudential ones. Id. at 3.

The issue can arise only in antidumping cases being conducted by the Department of Commerce under 19 U.S.C. § 1673. Moreover, the issue does not in any sense broadly concern the administration of the antidumping duty statute by Commerce.[1/] It involves only the aspect of the statute that is relevant when Commerce calculates cost of production, and

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1/ Compare Downs v. United States, 187 U.S. 496 (1903) (where this Court examined the scope of export activities against which a bounty could be imposed under the countervailing duty law).

even then, is limited to the highly unusual situation where the agency is required to allocate costs among "co-products."

Moreover, the only real question at issue is a factual one, that is, whether, given the peculiarities of pineapple processing, the agency properly allocated costs of production between pineapple "meat" and pineapple juice based on the value of these products. This Court has ruled, however, that such factual analysis does not trigger a grant of certiorari. See, e.g., United States v. Johnson, 268 U.S. 220, 227 (1925). Further, in the realm of factual review and analysis, it is well established that the determinations of administrative agencies are treated with, and entitled to, great weight. See Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837, 844 (1984). In the present case, Dole raises only questions turning entirely on the facts, and with little, if any impact, outside the limits of this case. For this reason alone, certiorari should be denied.

### B. This Court and Others Have Recognized Correctly That the Complex Factual Question At Issue in This Case Falls Squarely Within the Province of the Commerce Department and Its Special Reviewing Courts

Recognizing the highly factual nature of antidumping investigations and the complex calculation of costs that such investigations sometimes require, the question at issue in this Petition has been circumscribed to the province of the Commerce Department.[2/] As the appellate court has stated,

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2/ That the antidumping law involves a complex web of factual determinations is reflected in the very limited number of instances in which this Court has taken up cases in this area of the law. In fact, the last time

(continued...)

Commerce is the "master of antidumping law." See Daewoo Elec. Co. v. International Union, 6 F.3d 1511, 1516 (Fed. Cir. 1993), cert. denied, 512 U.S. 1204 (1994). In turn, the court "accords deference to the determinations of the agency that turn on complex economic and accounting inquiries," and the methodologies relied on by Commerce in making its determinations are presumptively correct. Fujitsu General Ltd. v. United States, 88 F.3d 1034, 1044 (Fed. Cir. 1996). This Court, too, has routinely embraced this notion. See, e.g., FPC v. Florida Power & Light Co., 404 U.S. 453, 463 (1972) ("Particularly when we consider a purely factual question within the area of competence of an administrative agency created by Congress, and when resolution of that question depends on 'engineering and scientific' considerations, we recognize the relevant agency's technical expertise and experience . . . .").

The concessions made by Dole on this point are telling once again. Indeed, Dole acknowledges that "antidumping law and the determinations required for its application have the requisite complexity for the Commerce Department to be considered its 'master' " and that "the courts are and should be loathe to second-guess the Department, with all of the material and technical resources available to it, when it does what it does best." Petition at 13. What Dole fails to realize, however, is that the very issue addressed by the appellate court that it

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(...continued)

this Court granted certiorari on a case involving U.S. international trade laws was in 1978. See Zenith Radio Corp. v. United States, 437 U.S. 443 (1978). While Zenith Radio was concerned broadly with the proper interpretation of the countervailing duty law, this case, in contrast, concerns a narrow and purely methodological issue affecting the calculation of antidumping duties that turns on the analysis of complex facts. As such, this is not a case that should compel the Court to re-familiarize itself with the morass of laws governing unfair practices in international trade.

now challenges -- the allocation and calculation of production costs -- is exactly the type of complex factual question that virtually every court of judicial review has left to the expertise of the agency. See, e.g., Marsh, Secretary of the Army, et al. v. Oregon Natural Resources Council, et al., 490 U.S. 360, 376-77 (1989) (rejecting argument that issue reviewed is of a legal nature because analysis of relevant documents 'requires a high level of technical expertise,' in turn requiring Court to defer to 'the informed discretion of the responsible federal agencies.' " (quoting Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)).

This Court, in turn, has recognized the "expertise of the Court of International Trade . . . in making complex determinations in a specialized area of the law . . . ." United States v. Haggar Apparel Co., 143 L. Ed. 2d 480, __ U.S. __, 119 S. Ct. 1392, 1400 (1999). While Dole relies on Haggar for the proposition that the CIT's contrary view of the facts regarding pineapple cost allocations somehow trumps the decision of the appellate court, it misses the significance of that court's specialized jurisdiction, and, in turn, the specialized jurisdiction of the appellate court.[3/] That is, issues pertaining to the allocation of production costs in antidumping cases are best left to the expertise of these courts, and, as discussed infra in section II.B.1., it is these courts that are best able to distinguish their own precedent. Dole also overlooks the important point that the differing outcomes in the lower and appellate court cases resulted from the lower court's failure to accord proper deference to the agency under the Chevron doctrine, (see Pet. App. at 13a), a principle that guided the appellate court in its consideration of the pineapple cost allocation issue and further underscores the factually intensive and complex nature of this issue.

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3/ At the same time, however, Dole acknowledges that the appellate court is a specialized court charged with overseeing the operations of the Commerce Department. Petition at 16.

## II. *IPSCO* DOES NOT CONSTITUTE "BINDING JUDICIAL PRECEDENT" THAT LIMITS COMMERCE'S CONSIDERATION OF A SIMILAR ISSUE INVOLVING DIFFERENT FACTS

Perhaps recognizing that the underlying issue in this case turns on the resolution of a factual question by Commerce, Dole attempts to characterize Commerce's action as a failure to adhere to allegedly "binding judicial precedent" governing cost allocation methodologies established by the Federal Circuit in IPSCO III. See, e.g., Petition at 16. Dole's contention that IPSCO III creates a binding rule governing cost allocation methodologies and that the Federal Circuit must abide by that rule to comply with the principle of stare decisis is without merit. Here, the Federal Circuit could not apply the rule in IPSCO III because the facts at issue in the present case were readily distinguishable from the facts in IPSCO III. The appellate court, therefore, properly upheld Commerce's decision that the unique production process of canned pineapple fruit and juice justified application of a different cost allocation methodology than the methodology applied to allocate costs incurred in producing prime and limited service pipe. Commerce thus did not contradict "binding judicial precedent" when it allocated pineapple costs using a different methodology than the methodology adopted in IPSCO III.

### A. The Federal Circuit's Distinction of *IPSCO* and the Present Case Was Not "Transparently Inadequate"

As a threshold matter, Dole argues, as it must, that the case at bar squares with IPSCO III and that the Federal Circuit has "transparently" distinguished the two cases by noting simply that steel pipes and pineapples are different items. Petition at 14-15. This is a glib assessment of the analysis of

complex production processes and accounting methods undertaken by Commerce and upheld by the appellate court.

In IPSCO III, the Federal Circuit held that weight represented an appropriate method for allocating the costs of inputs used to produce prime and off-spec pipe given record evidence showing that pipe producers "expend the same materials, capital, labor, and overhead for both grades of OCTG." IPSCO III, 965 F.2d at 1060. Only when the final products are inspected at the end of the production process can the value of the pipes be assessed.

In contrast, canned pineapple fruit and pineapple juice are made with different inputs of differing values. Canned pineapple fruit is generally made with the more expensive cored cylinders of pineapples. Because the parts of the pineapple have different uses and values, they are not interchangeable. Pet. App. at 12a. Pineapple juice is made from the leftover fruit that can be eradicated from the peel of the pineapples after the core is removed and from the inferior quality cuts of the pineapple. It is because these input values differ, and because the Thai pineapple producers' books and records recorded this difference, that Commerce and the Federal Circuit determined that allocating 80 percent of the fruit cost to canned pineapple and 20 percent to pineapple juice was an accurate assessment of the costs of production of the two co-products. Pet. App. at 8a.

Finally, the Federal Circuit addressed the very circularity concern of the court in IPSCO III, that is, whether, under the agency's methodology, the selling price (or value) of pineapple became the yardstick for measuring the selling price of pineapple, and concluded that this concern was not implicated by the methodology selected by Commerce. Pet. App. at 13a. The appellate court noted specifically, that Commerce's allocation of the cost of raw pineapple fruit

between canned pineapple fruit and other products was not based on the selling price of these products, but on the foreign producers' own books and records. See id.

Given this sophisticated consideration of two differing and complex sets of facts undertaken by the agency and both reviewing courts, Dole's argument that IPSCO III and the present case "cannot be meaningfully distinguished" is wrong. Rather than simply noting that pipe and pineapple are different products, the appellate court examined the nature and cost of the inputs for these products, their production process, and the manner in which the Thai producers' financial systems accounted for these factors. This analysis constituted a more than adequate distinction of IPSCO and the present case.

### B. The Federal Circuit Did Not Ignore Principles of Stare Decisis and Disregard Binding Precedent Because the Facts of *IPSCO* and the Present Case Are Distinguishable

#### 1. Dole Has Misconstrued the Meaning of Stare Decisis and Its Relevance to this Case

Invoking the mantra of stare decisis, Dole claims that, "{a}t its core, this case concerns whether the Department of Commerce is obligated to follow IPSCO . . . ." Petition at 16. Dole, however, fails to recognize that principles of stare decisis do not apply when a case is distinguishable on its facts. Moreover, the Federal Circuit, as the Court that decided IPSCO III, is in the best position to determine the precedential effect of IPSCO III vis-a-vis the new and different set of facts presented by Thai Pineapple.

Specifically, because of the clear distinctions between IPSCO and Thai Pineapple II, the limit of judicial deference to agency action that contradicts binding judicial precedent is not at issue in this case. Rather, as set forth supra, in Thai Pineapple II, the Federal Circuit upheld the agency's methodology because Commerce properly distinguished the facts it was reviewing from those at issue in IPSCO. Pet. App. at 13a. Thus, while the Federal Circuit's decision differs from IPSCO III, it is not inconsistent with it and certainly does not overrule it.

The principle of stare decisis and the judicial practice of distinguishing cases involving similar issues on the basis of differing facts are not mutually exclusive and both are essential to the proper functioning of the judicial system. The essence of the common law doctrine of precedent or stare decisis is that the rule of the case creates a binding legal precept but only as to similar facts. As explained by one court, "A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy." Chowdhury v. Reading Hosp. & Med. Ctr., 677 F.2d 317 (3d Cir. 1982), cert. denied, 463 U.S. 1229 (1983) (quoting Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 969-70 (3d Cir. 1979) (emphasis added)); see also Addonizio v. United States, 573 F.2d 147, 151 (3d Cir. 1978), rev'd on other grounds, 442 U.S. 178, 99 S. Ct. 2235, 60 L. Ed. 2d 805 (1979); Institute for Scientific Info., Inc. v. United States Postal Serv., 555 F.2d 128, 130 (3d Cir. 1977)). Thus, the notion of "precedent," or stare decisis, is only controlling insofar as facts across cases are similar. Given the distinctly different factual underpinnings of IPSCO III and the present case, Dole has thus

misconstrued the relevance of the stare decisis principle to this case.

In this regard, Dole wrongly faults Commerce for citing no other cases that allocate costs on the basis of value. Petition at 18. Indeed, the reason that Commerce cites no other cases that applied a value-based methodology is that the facts presented in the present case are unique, which is the very reason that the agency, within its discretion to examine the facts and select appropriate methodologies, chose to allocate costs on the basis of the value formulas reflected in the Thai producers' books and records rather than the alternative weight-based methodology found to be appropriate under the facts of IPSCO III. In fact, it is entirely possible that Commerce may never again apply the methodology upheld in Thai Pineapple II if a comparable factual scenario justifying application of that methodology does not arise. Thus, contrary to Dole's claims, there was no need for the appellate court to "overrule" IPSCO III, and the court thus did not "abdicate its role in upholding principles of stare decisis." Petition at 19. Rather, the court simply concluded, as it was well-positioned to do, that its own precedent was not controlling.

### 2. *Yellow Taxi* Is Not Controlling Given the Important Factual Differences Between *IPSCO* and the Present Case

Just as Dole wrongly invokes the concept of stare decisis, its reliance on Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 372 (D.C. Cir. 1983), for the proposition that agencies must conform to judicial precedent also is misplaced. As set forth supra, while this proposition is indisputable to the extent that a case is not appropriately distinguishable, if the facts of a case differ from the facts of otherwise binding precedent, then a court, through its essential function of applying law to facts, must distinguish the two

cases and revise the rule. The case at bar is such a case, making Yellow Taxi inapplicable.

In the administrative decision at issue in Yellow Taxi, the NLRB found that taxi cab driver/lessees were "employees" of a cab company/leasor for purposes of the National Labor Relations Act ("NLRA"). In an earlier case, the D.C. Circuit ruled that cab driver/lessees operating under a nearly identical lease to the one at issue in Yellow Taxi were not employees for purposes of the NLRA. See Local 777, Democratic Union Organizing Committee, Seafarers International Union of North America v. NLRB, 603 F.2d 862 (D.C. Cir. 1978) ("Seafarers").

Because the leases at issue in Yellow Taxi and Seafarers were virtually identical and the facts were not materially distinguishable, the D.C. Circuit, reviewing the administrative decision at issue in Yellow Taxi, held that the NLRB must respect the applicable decisions of the court. Yellow Taxi at 382. While the court in Yellow Taxi said that "a disagreement by the NLRB with a decision of this court is simply an academic exercise that possesses no authoritative effect," at the same time, the court recognized that the two cases were indistinguishable and overruled the NLRB because the leases in both cases, analyzed under the NLRA, indicated that the cab drivers were not "employees" as defined by the NLRA.

Comparing leases to determine whether each establishes the same relationship between the leasor and the lessees requires a far less rigorous factual analysis than comparing multi-step production processes for radically different products and the various cost allocation accounting methods that can be used to measure costs of production. While Dole states that Yellow Taxi and the present case are "analytically identical" (Petition at 17), it misses the important point that the facts at

issue in Yellow Taxi and Seafarers were simple -- virtually identical leases establishing virtually identical relationships between cab companies and cab drivers -- while the facts at issue in IPSCO and Thai Pineapple are complex -- how to allocate costs involved in the complex production processes of pipe and pineapple.

In short, Commerce employed a reasonable allocation methodology designed to accurately account for differing values, and, hence, different production costs among pineapple co-products. If a weight-based methodology advocated by IPSCO were used, it would accord the same input value to more expensive cored cylinders of pineapple fruit as it would to the less expensive juice co-product. The Federal Circuit realized the potential error in this outcome, and, deferring to Commerce's expertise, affirmed the agency's position that allocating costs for the production of canned pineapple fruit and pineapple juice was a sufficiently unique exercise to justify a different approach from the allocation methodology adopted in IPSCO III.

## III. IN ANY EVENT, THE APPELLATE COURT CORRECTLY CONCLUDED THAT COMMERCE'S DECISION WAS BASED ON SUBSTANTIAL EVIDENCE

The distinctions between Thai Pineapple and IPSCO aside, Dole's petition does not warrant exercise of this Court's jurisdiction because the appellate court properly applied the governing standard applicable to review of Commerce determinations. See PPG Indus. v. United States, 978 F.2d 1232, 1236 (Fed. Cir. 1992) (Federal Circuit, in reviewing Court of International Trade decisions, applies the same substantial evidence standard applied by the Court of International Trade). Applying this standard, the Federal Circuit was bound to uphold Commerce's determination unless

it was "unsupported by substantial evidence on the record, or otherwise not in accordance with law." Micron Technology, Inc. v. United States, 117 F.3d 1386, 1393 (Fed. Cir. 1997) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)).

The Federal Circuit thrice stated that Commerce's chosen cost allocation methodology as to both Dole and the remaining Thai producers was "reasonable and supported by substantial evidence." Pet. App. at 10a, 11a, 14a. In so doing, it cited evidence pertaining to the consistency of the allocation methodologies used by the Thai producers in their normal books and records, (Pet. App. at 8a, 9a, 10a, 14a), the accuracy of these methodologies as "reasonably reflective" of production costs and the companies' actual production experience, (Pet. App. at 8a),[4/] the historical reliance on these methodologies by Thai producers, (Pet. App. at 8a, 9a, 14a) and the absence on the record of any examples of companies that relied on a different methodology (Pet. App. at 8a). Further, the court noted that

> the description of the production process provided to Commerce by {certain Thai producers} reflects a distinction in the quality and portions of pineapple fruit used to produce canned pineapple fruit and juice that is consistent with the normal allocation in their books and records.

Pet. App. at 8a. The appellate court thus was able to tie the agency's chosen methodology to the Thai producers' own

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4/ With respect to Dole, in particular, the appellate court recognized that Dole occasionally purchased smaller pineapples for use in producing juice products, thus according some measure of value for the portion of the raw pineapple fruit used to make juice. Pet. App. at 10a.

processes and explanations about how canned pineapple was produced and how production costs were recorded.

Given these factual findings made by the agency, Commerce's cost allocation methodology was reasonable and supported by substantial evidence. The Federal Circuit, in turn, correctly reversed the Court of International Trade because that court "rejected a reasonable allocation methodology which Commerce determined recognized the use and value of the raw material." Pet. App. at 13a. Because the result reached by the appellate court was based on substantial evidence, certiorari is not warranted in this case.[5/]

## CONCLUSION

For all of the foregoing reasons, respondent Maui respectfully requests that this Court deny Petitioners' request for a Writ of Certiorari and that this matter be remanded to the lower court on the issue of attorney's fee for findings consistent with the ruling of the Court of Appeals for the Federal Circuit.

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5/ See White, Supreme Court Review of Agency Decisions, 26 Admin. L. Rev. 107, 110 (1974) (noting "the prevailing rule, peculiar to Supreme Court litigation, that once a Court of Appeals has found an agency fact judgment supported by substantial evidence, the case does not merit further review and the appellate function is at an end.").

Respectfully submitted,

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No. 99-1246

In the
*Supreme Court of the United States*

DOLE FOOD COMPANY, INC.,
*ET AL.*,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*ET AL.*,
*Respondents.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

# PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## Introductory Statement

Petitioners Dole Food Company, Inc., Dole Packaged Foods Company, and Dole Thailand, Ltd. (hereinafter collectively referred to as "Dole"), have petitioned this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Federal Circuit, which reversed a judgment of the United States Court of International Trade. The referenced decisions are attached to the Petition.

Both the United States and the United States Department of Commerce ("the Federal Respondents"), on the one hand, and Maui Pineapple Co., Ltd. ("Maui"), on the other, have filed briefs in opposition, to which Dole now respectfully replies.[1]

The dispute at Bar concerns the application of the antidumping statutes, and in particular 19 U.S.C. § 1677b. Petitioners produce and sell canned pineapple juice in Thailand, which is exported to the United States. Respondent Maui, a U.S. company, filed an antidumping petition alleging that Dole and other Thai producers were selling pineapple juice in the United States at less than their cost of production. Obviously, in the course of investigating those allegations, one of the determinations the Federal Respondents were required to conduct was of the actual cost of production of pineapple juice in Thailand.

In the common manufacturing practice, a pineapple is the input for a process that results in the production of both canned pineapple fruit and also pineapple juice. The cost of the pineapple itself must somehow be apportioned between those two co-products. Given that, for various reasons, the apportionment formula actually employed by Dole on its

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[1] These are referenced below as "Fed. Opp." and "Maui Opp.," respectively.

books – although perfectly consistent with generally accepted accounting principles (GAAP) employed in Thailand – was an unacceptable basis for the calculation, the allocation had to be done in another way. There are only two logical possibilities for assigning input costs to co-products: in proportion either to inherent characteristics of the outputs (*e.g.*, their weight), or, according to extrinsic factors (such as their relative values). Petitioners argued that the former method is the only correct one as a matter both of logic and of law: of logic, because using a value-based algorithm for determining value is inherently circular, and of law, because a court of competent jurisdiction has definitively spoken on the issue. The Federal Respondents are defending the application by the Commerce Department of a value-based methodology.

Petitioners contend that the court below grievously erred by permitting a federal agency, when it is charged with construing a statute, to do so in a manner expressly prohibited by a binding judicial decision, according deference to such action in contravention of this Court's teaching in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). While the "subject matter" of the case concerns the proper apportionment of raw material costs between co-products -- two commercially valuable outputs from a single manufacturing process – for the purpose of deriving a constructed cost of production, the matters at issue are substantially farther-reaching.

The Federal Respondents, in their cursory insistence that any interpretation of the law is entitled to respect simply because it has emerged from the executive branch of government, entirely miss the point, not only of what happened in the proceedings below, but of the jurisprudential issue at stake in this case. Maui, by contrast, appreciates the significance of the case, and makes a valiant effort to defend the indefensible, which ultimately, for the following reasons, fails.

## 1. The Federal Respondents Miss the Point: The Decision Below Extends Deference to Agency Action That Is Inconsistent with Binding Law.

Every case turns on its facts. Every case is unique. Yet as every law student learns, the key to the principle of stare decisis that lies at the heart of the common law is that judicial decisions encapsulate principles that may be abstracted from them. And the decision below, if allowed to stand, would be authority for a very radical and troubling principle indeed: that executive branch agencies may ignore binding instructions from the judiciary as to the proper interpretation of the statutes that they are charged by law to administer.

Petitioners have demonstrated to the Court that the interpretation of the antidumping statute applied by the Department of Commerce in this case, 19 U.S.C. § 1677b, directly contravened the binding judgment of the United States Court of Appeals for the Federal Circuit in *IPSCO, Inc. v. United States*, 965 F.2d 1056 (Fed. Cir. 1992). For this reason, it is entitled to no deference. The Court of International Trade correctly struck it down, directing Commerce to apply a cost-apportionment methodology that was consistent with *IPSCO*; the Federal Circuit erred in reinstating the agency's disposition of the case.

In *IPSCO*, the court below was faced with the very same issue presented here: whether the value of coproducts resulting from the same initial manufacturing process must be done according to inherent characteristics of the products themselves, or by allocation in proportion to their resulting values. The decision issued by the court was not equivocal: it did not find that either solution would do, or that one was preferable but the other acceptable. Rather, it found that only one approach to this question is consistent with the underlying statute, which mandates that actual values be used to the extent

possible. The court wrote, in reversing a Court of International Trade invocation of a value-based system:

> Essentially, the trial court ordered an unreasonable circular methodology. The selling price of pipe became a basis for measuring the fairness of the selling price of pipe. **This circular reasoning contravened the express requirements of the statute** which set forth the cost of production as an independent standard for fair value.

965 F.2d at 1061 (emphasis added).

The *IPSCO* court held, therefore, that in interpreting and applying 19 U.S.C. § 1677b to situations in which input costs had to be divided between co-products to arrive at a constructed cost of production, the Department of Commerce had no choice, no discretion, and no latitude: it had to use a methodology based on physical characteristics, and could not legally use a system based on value. "In *IPSCO*,, the Federal Circuit found that a value-based allocation of costs to co-products violates the antidumping statute. *IPSCO*, 965 F.2d at 1061." *Asociación Colombiana de Exportadores de Flores v. United States*, 6 F. Supp.2d 865, 881 (C.I.T. 1998).

And yet, in the case at Bar, the Commerce Department did **precisely** what was forbidden by *IPSCO*, and the Federal Circuit effectively upheld that unbridled exercise of executive discretion. It is this that raises the *Chevron* question, for an agency is not entitled to deference in its statutory construction, even in an area consigned to its "special expertise," *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1044 (Fed. Cir. 1996), when it acts in violation of a binding judicial instruction on how the law is to be applied properly. Any other conclusion is profoundly irreconcilable with fundamental principles of the government of this Nation, under which executive agencies are

answerable to the courts, and only the courts are the ultimate arbiters of what the law means.

The Federal Respondents, however, would ignore all that. To present their case that what happened below was in all respects unexceptionable, they misunderstand a key element of the actual proceedings below. They seem to suggest that the Department of Commerce had two choices from which to select in allocating the cost of a pineapple to the co-products of juice and canned fruit: the method actually employed by Dole in the accounting records of its Thai affiliate, or the value-based algorithm ultimately adopted by Commerce.

This is entirely inconsistent with the record: it is simply not what happened. This is not the choice Commerce confronted, nor does it reflect the position taken by Petitioners.

Everyone agreed that the apportionment formula used by Dole in its books, while entirely lawful, was not reflective of the actual cost of production of canned pineapple fruit. The use of Dole's records was therefore not an option: indeed, it was the fact that Petitioners' own formula was unhelpful that caused Commerce to employ a method for constructing a cost in the first place.[2]

The difference between Petitioners and the Federal Respondents is not that Dole wanted the Department to use Dole's formula and Commerce insisted on applying a constructed cost methodology. The difference is with respect to what kind of constructed cost methodology is consistent with the statute. And as to that, the Federal Circuit had spoken: only a weight-based allocation formula can be

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[2] Maui readily acknowledges this. *See* Maui Opp., at 5. Indeed, Maui's account of the proceedings below is entirely accurate, even if it does not support the conclusions and characterizations Maui would derive from it. *Id.*, at 1-6.

reconciled with the law. The choice was not between a nonsensical outcome (which would have been the result had Dole's figures been used) and a sensible if possibly imperfect one; it was between a method of constructing costs that had been held to be mandated by law, and one that had been held to be illegal and circular.

The Federal Respondents, by apparently contending that they had no choice but to use a value-based allocation formula, save straying even further from their statutory mandate, simply miss the point. The point remains that the erroneous methodology that the Department of Commerce used for apportioning the value of a common input between two co-products was the one specifically condemned as unlawful in a binding decision of the relevant circuit court. The agency determination based on that methodology was therefore entitled to no deference under *Chevron* and its progeny, and the court below committed fundamental error when it held otherwise. The decision below should therefore be reversed.

### 2. Maui Too Fails to Address the Key Issue

a. The Issue Before This Court Is of Great Significance.

Both Respondents have, not surprisingly, tried to frame this case as a matter of case-specific "factual complexity," if not of great obscurity impenetrable by judicial eyes, and therefore inappropriate for review by this Court. Maui Opp., pp. 9-12; Fed. Opp., pp. 9-10. They must take this approach, of course, because unless Respondents successfully advance a theory of dispositive "factual differences," binding judicial precedent – *IPSCO* -- mandates reversal of the Court of Appeals decision.

However, Respondents' constant reminders of just how complicated the antidumping laws are to no avail in distracting attention from the portents inherent in the decision

below. The gist of their argument, like the gravamen of the decision they defend, is that the goods at issue in this case -- pineapples -- are different from the goods at issue in *IPSCO* - steel pipe. Respondents aver that these differences are "material," although no coherent explanation for the materiality of the differences as they may affect the allocation of costs has been proffered. Maui Opp., pp. 17-19, Fed. Opp., pp. 9-10.

Maui acknowledges that agencies are bound by judicial precedent, as the D.C. Circuit taught in *Yellow Taxi Co. of Minneapolis v. NLRB*, 721 F.2d 366 (D.C. Cir. 1983), a case on which Petitioners place substantial reliance. The court in *Yellow Taxi* expressly accorded **no** deference to an agency's assessment of whether judicial precedent was applicable to the facts of a particular case. The case stands for a proposition very close to the opposite of the one for which Maui cites it. Under *Yellow Taxi*, the determination whether a judicial decision is binding on an agency us ultimately for the courts, and the agency's answer to that question is not dispositive.

Yet Maui seeks to avoid the application of *Yellow Taxi* to the present case by arguing that in that case, the facts were "not materially distinguishable" from the facts of the earlier, binding decision." Maui Opp., p. 18. Yet in *Yellow Taxi*, the NLRB engaged in precisely the same exercise as the Federal Respondents did here: they attempted to distinguish precedent on the basis of allegedly material differences in the facts. *Yellow Taxi*, 721 F.2d at 373. The NLRB did not prevail in *Yellow Taxi*. For the same reasons, Respondents should not prevail here.

The issue before this Court is not whether pineapples and pipes are different: anyone who has ever enjoyed a piña colada (presumably including at least some members of this Court) can aver gratefully that they are. The issue is whether the differences between pineapples and pipes are relevant for determining whether a judicial decision applicable to one is

dispositive of a case concerning the other. A determination of that question depends not upon a comparison of the physical properties of tropical fruits with oil country tubular goods, but upon a proper analysis of the judicial decisions at issue. As has been noted, the appellate court's decision in *IPSCO* does not depend on metallurgy.

The answer was provided by Judge Bork in *Yellow Taxi*, by Judge Posner in *Nielsen Lithographing Co.*, 854 F.2d 1063, 1067 (7th Cir. 1988), and by the Ninth Circuit in *RLC Indus. Co. v. Commissioner*, 58 F.3d 413, 415-16: **Agencies are entitled to no deference when they interpret case law**. Indeed, the very case quoted in Maui's brief to support unbridled deference in the face of contrary authority actually produced the opposite result. In *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965 (3d Cir. 1979), the court **rejected** an agency's efforts to avoid the applicability of binding judicial precedent. *Allegheny Gen. Hosp.*, 608 F.2d at 969. The question of whether *IPSCO* applies to the present case was not for administrative resolution, but was a matter for the courts to decide. And the specialized court assigned that task – the Court of International Trade – determined, after careful analysis, that *IPSCO* does apply.

While *Chevron* requires courts to defer to agencies in their interpretation of their own statutes and regulations, it does **not** require courts to give deference to administrative interpretation of case law. Maui acknowledges, as it must, that *Chevron* is the basis for the decision of the court of appeals to the effect that the Department's view may not be challenged. Respondent taxes the trial court for according insufficient deference, supposedly in violation of this Court's instructions in *Chevron*. Maui Opp., p. 12. Yet what the Court of International Trade did was exactly correct: it told the agency over which it has oversight responsibility that it must follow the law, and it must adhere to binding judicial decisions.

b. Review by This Court is Necessary to Ensure That *Stare Decisis* is Respected in the Federal Circuit

It is of course true that the United States Court of Appeals for the Federal Circuit has appellate jurisdiction over cases brought before the Court of International Trade after being tried in the International Trade Administration of the Department of Commerce. Maui suggests that the only assurance of propriety needed is the fact of that court's involvement. But the court of appeals, even with its body of specialized expertise and experience, like the agency below, is not infallible. It has here misapplied the *Chevron* doctrine

Because of the factual complexity of the proceedings before any administrative agency in modern society, it will always be possible to invoke "material factual differences" to suggest that any case presented is recondite and unique, and thereby to distinguish precedent and seek to avoid the application of case law that the agency does not like. The court of appeals has in this case given the Department of Commerce its stamp of approval to do just that.

Parties subject to the exclusive jurisdiction of the Federal Circuit do not have the option of finding alternative venues. The benefits of inter-circuit non-acquiescence, elucidated in this Court's decision in *U.S. v. Mendoza*, 464 U.S. 154 (1983), do not apply in circuits of exclusive jurisdiction such as the Federal Circuit. For that reason too, Respondents' misreading of *Chevron* adopted by the court of appeals must be corrected by this Court.

## Conclusion

For all of the foregoing reasons, as well as for those articulated in its Petition, Petitioners Dole Food Company, Inc., Dole Packaged Foods Company, and Dole Thailand, Ltd., respectfully submit that the decision of the United States Court of Appeals for the Federal Circuit below cries out for the intervention of this Court pursuant to Rule 10(a) and (c) of its

Rules, and they therefore pray that a writ of certiorari issue to that court so that its decision may be reversed.

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